Exhibit 2

Capmark Hearing Transcript

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	)	Case No. 09-13684 (CSS)
	)	Chapter 11
CAPMARK FINANCIAL GROUP, INC., *et al*,	)	
	)	Courtroom No. 6
Debtors.	)	824 Market Street
	)	Wilmington, Delaware 19801
	)	
	)	November 24, 2009
	)	1:00 P.M.

TRANSCRIPT OF HEARING
BEFORE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

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THE CLERK: All rise.

THE COURT: Please be seated. Good afternoon, Mr. Kessler.

MR. KESSLER: Good afternoon, Your Honor.

THE COURT: If I could just jump in for just a minute. And I don't know how you want to go through the agenda, but I note that a substantial number of the matters are either uncontested or resolved. I like to get to the main event as soon as we can.

MR. KESSLER: Yes.

THE COURT: So if there are no changes in orders, I'm prepared to sign those motions and if there are material changes, do you want to walk me through that's fine. The only thing I saw going forward was press on a contested basis was 9,15 and 16, but I may be wrong. Nine is the private sale/auction issue with the Committee.

MR. KESSLER: Correct. Well, I don't have the numbers on the agenda committed to memory but there are three: the sale of the mortgage servicing business, the wages motion and the, and the private auction sale to Premier.

THE COURT: Right, I think that, that's all I saw.

MR. KESSLER: Oh and ordinary course professionals may be an objection.

THE COURT: Okay, very good. Let's - -

MR. KESSLER: Mr. McMahon also has an issue with a matter, not ours but a counterparty who is asking to seal agreements that are attached to their order, and he will raise that separately.

Your Honor, before we begin I've been asked by Mr. Glassman if he can take the podium for a moment and introduce some members of the Creditors' Committee, some counsel for the Creditors.

THE COURT: All right, very good. Good afternoon, Mr. Glassman.

MR. GLASSMAN: Hello, Your Honor, Neil Glassman of Bayard. We have been selected and the or the Committee has filed an application for our retention as Delaware counsel to the Committee; Kramer Levin has been selected. They're here; Mr. Tom Mayer, Amy Caton, Josh Brody.

THE COURT: Welcome.

MR. GLASSMAN: Thank you, Your Honor.

THE COURT: So can we sail through the - -

MR. KESSLER: Yes, I'm going to try to sail through as quickly as I can. I did take or I would like to present some of them out of order just because they logically go together in some instances.

THE COURT: All right.

MR. KESSLER: And one last comment before I get going. We do have a consent extension of the interim cash

collateral order; however, one of the bank's lawyers apparently didn't get notice of the fact that this hearing was pushed forward to 1:00. He sent me an e-mail that I received on my Blackberry that he's on the train and would like to push that back until later this afternoon until he gets here.

THE COURT: Okay.

MR. KESSLER: So the first one I'd like to address, Your Honor, is the extension of time to file schedules.

THE COURT: Okay.

MR. KESSLER: The, of course, there are no objections. The motion seeks an extension of time to file the schedules of assets and liabilities, executory contract, unexpired leases, etc.

THE COURT: Okay, I'll sign it. I really don't need that. If it's uncontested, I read the motions. We got a lot to do on the sale, so. Anybody wish to be heard? All right, I'll approve the motion.

MR. KESSLER: The next one on my agenda is items 2 and 12 that go together: the continued operation of the business in the ordinary course and; then, Your Honor, will recall that we filed a supplemental motion to extend or expand this motion to encompass the, the loan origination business.

THE COURT: Uh huh.

MR. KESSLER: And there are no objections, as far as I know, on this.

THE COURT: Well there was a limited GE objection, is that resolved? It was on the original motion. I thought.

MR. BENEDICT: Your Honor, Mark Benedict for GE Capital. And there was a limited objection on the original, and it was resolved by language in the order. And that language continues in the proposed order on these motions, so our objection is continued to be resolved.

THE COURT: Okay, thank you. Please approach. All right, very good. Just give me a moment.

Please keep your Blackberries below the table and we'll get less interference or maybe out of your pocket.

All right, I've signed both orders.

MR. KESSLER: Okay the next one is on your agenda as item 4, Your Honor, its prepetition taxes that was approved on an interim basis and we're now here seeking the entry of the final order. On an interim basis, we ask for $200,000.00. On a final basis, we're asking for authority to pay prepetition taxes up to $2.3 million dollars, and there are no objections.

THE COURT: All right. Again, there was a limited objection of GE that I understand is resolved?

MR. KESSLER: Yes.

THE COURT: Okay. I'll sign the order. Please approach. I've signed the order.

MR. KESSLER: The next one is item 5 on your agenda it's the cash management motion that was set for final hearing today. It was originally entered as an interim order. Your Honor, the Creditors Committee has asked that we continue or extend the interim order on cash management until the December 10th hearing so that their financial advisors can have more time to deal with the complex issues in that motion. And so if it's all right, we'd like to submit another interim order to extend to December 10th. I believe there are no other objections.

THE COURT: We have a hearing that day, right?

MR. KESSLER: I'm sorry?

THE COURT: That's the next hearing - -

MR. KESSLER: That's our next omnibus hearing date.

THE COURT: Yeah that's fine. Thank you. I've signed the order.

MR. KESSLER: Your Honor, the next one is item 6 on your agenda. It's docket number 11, and it's the Debtors' motion to reject five unexpired office leases, *Nunc Pro Tunc* to the petition date. We filed this motion on the petition date or the commencement date. We served notice on each of the landlords of these five leases. No objections were filed; however, we did get a communication from one of the

landlords at first refusing to acknowledge that the Debtors had vacated the premises because some furniture was there. We reached a resolution with the landlord to abandon the furnitures of the landlord and to allow that this lease be deemed vacated as of the petition date, so all five of the leases were vacated prior to the petition date. There are no objections. The, we understand the rule in Delaware that the Court has the discretionary authority to allow a *Nun Pro Tunc* rejection. In this case, we believe it is warranted especially since no objections were filed.

THE COURT: All right.

MR. KESSLER: Or submitted by the landlords.

THE COURT: Very good. Please approach. Anyone wish to be heard? All right, I'll approve the motion. Thank you. I've signed the order.

MR. KESSLER: Okay, Your Honor, the next one is the motion to approve a procedure for ordinary course professionals. There were no formal objections filed; however, in consultation with the United States Trustee's Office, we agreed to conform the order to an order that is used in another case in this district the *Nortek* case. Mr. McMahon does have, wants to make some information comments which we agreed he could make, notwithstanding he's not making an objection. What this order does is allow ordinary course professionals to accrue and be paid up to $35,000.00

per month on a rolling basis with a small list of 13 or 14 professionals monthly cap being as much as $60,000.00, yet provides that ordinary course professionals who are non-lawyer professionals must waive any prepetition claims they have. And as 327(e) provides, which I think is illogical but, nonetheless, any lawyer who did not represent the Debtor prepetition will also waive any prepetition claim that such lawyer may have. I'm not exactly sure how that can happen, but so be it. Other than that, I think Mr. McMahon had asked us for a precise number of the ordinary course professionals who will no longer be necessary or used after the sale of the mortgage servicing business. I have not been able to get a precise number for him. Only I've been able to, can only say at this time that it is a large number of them who services will no longer be required after the mortgage servicing business is sold.

THE COURT: All right, thank you. Mr. McMahon.

MR. MCMAHON: Your Honor, with the Court's permission I just like to skip over this for the moment and come back to it at the end. I'm still trying to pin down one issue with my client.

THE COURT: That's fine.

MR. MCMAHON: Thank you.

MR. KESSLER: I assume that means I should hold the order?

THE COURT: I would expect so.

MR. KESSLER: Okay just trying, Your Honor, item 8 on the agenda which is docket number 14 and 59. This is the motion that we filed on the first day denominated by us as the trading motion. Your Honor will recall that on an interim basis, the Court entered an order that restricted, restricts trading in equity of the Debtor only and did not, we did not request entry of the portion of the order that requested restricting, the restrictions on the trading of claims. On a final basis, we're again asking only that the trading restriction on equity be extended, and we are withdrawing without prejudice at this time request for any restrictions on the trading of claims. We may be back if we see trading activity of the size and magnitude that gives us any cause for concern about NOL's being lost in this case.

THE COURT: Okay.

MR. KESSLER: And, again, no objections were filed.

THE COURT: All right, please approach. Anyone wish to be heard? I'll approve the motion. Thanks. I've signed the order.

MR. KESSLER: Next is item 10 on your agenda. And this is the motion for approval of procedures for interim compensation to 327(a) professionals. And no objections were filed. The procedures that we've proposed are traditional and typical procedures in this district. I can go through

them if Your Honor would like, but they're set out in the motion.

THE COURT: That's not necessary. Anyone wish to be heard? I'll approve the motion. Thank you. I've signed the order.

MR. KESSLER: Next, I'd like to do item 3 on your agenda which is the final hearing on the utilities' motion.

THE COURT: Very good.

MR. KESSLER: On this motion, Your Honor, there was one objection filed by PECO which I believe is Pennsylvania Electric. We have resolved their objection with an agreement to make a deposit that is in excess of the two week deposit. We have not heard from or received objections from any other party. And so with the resolution of the PECO objection, I can say that there are no outstanding rejections to that motion. We'd ask that it be entered on a final basis.

THE COURT: All right, please approach. Anyone wish to be heard? I'll approve the motion and the final order. Thank you. Oh I'm sorry, I've signed the order.

MR. KESSLER: Okay next on your agenda items 17 and 18 and these two go together. Item 17 is docket #159 and 160. These are motions that were filed by one lawyer on behalf of two individuals each seeking to compel the Debtors to assume or reject their contracts that were, I'll call them retiree contracts, that were, that came into place prior to

or at the time of the sale of this business to Capmark. These are executives who were paid for covenants not to compete, as well as long term severance payments. There are payments that still remain under the contracts. The Debtors have agreed to the motion to compel and would like to reject the contracts immediately. We have consent from counsel for the two movants to this rejection. This also is the motion, Your Honor, where counsel for the movants is asking that the order not attach, but instead seal the actual compensation agreements or retirement agreements with these two individuals. And I'm not sure if he's in the Courtroom or wants to address it himself - -

MR. WETZEL: Yes, I'm right here.

MR. KESSLER: Oh I'm sorry.

MR. WETZEL: That's quite all right. John Wetzel on behalf of the movants, Your Honor. We agree to the consent order. And what we would like to see is that the, as it turns out my clients picked it up on ethic that there was an attachment to the agreement. They didn't pick it up on pay and they would like to see these, the time and agreements because they contain a lot of personal information to be sealed. They're retired and the contracts are rejected. I don't see any harm in doing that, Your Honor.

THE COURT: Well, I'm sorry are they already on, have they already been filed?

MR. WETZEL: They were filed of record that's correct, Your Honor.

THE COURT: They're on the docket.

MR. WETZEL: They're on the docket and the pace of docket, but the - -

THE COURT: Mr. McMahon.

MR. WETZEL: Pardon me?

THE COURT: I want to hear from Mr. McMahon.

MR. MCMAHON: Your Honor, Joseph McMahon for the United States Trustee. Again, the moving party filed them of public record and the issue is how do we put the genie back in the bottle at this point.

MR. KESSLER: For the record, Your Honor, the Debtors do not object to the ruling.

THE COURT: Can I, they're probably here. Hang on, let me look. They're in the binder, I assume? We're talking, I'm sorry. So it's Exhibit A, we're talking about the, are we talking about the agreement or the attachment to the agreement?

MR. KESSLER: The agreement, Your Honor, Exhibit #1, I believe referred to in the docket.

THE COURT: Well I don't see any provision in the contract about confidentiality.

MR. KESSLER: There isn't, Your Honor and that was the - -

THE COURT: Well I'm going to deny the motion, the oral motion I guess.

MR. KESSLER: The oral motion about striking it, Your Honor.

THE COURT: Yeah the oral motion for seal striking the plea.

MR. KESSLER: So with respect then I would assume then with respect to the order, would you be striking that out of the order because there's a paragraph in there that basically says order that the attachment number one to each of the motions a compel be removed from the public docket and filed under seal.

THE COURT: Yeah I will strike that.

MR. KESSLER: Thank you, Your Honor.

THE COURT: You're welcome. I have signed the order.

MR. KESSLER: Okay, Your Honor, I'm now through what I will affectionately call the easy part except for cash collateral which I ask that we push to the end because Mr. Sosnick is still on the train.

THE COURT: Right.

MR. KESSLER: So what we have left, according to my schedule, is the wages motion, the MSB, the 363 motion to sell military housing, and the, well the 363 sale motion to sell Premier asset. And there is a companion motion that

goes with the military housing which is, I believe, also will be a quick motion but since they go together, I'd like to keep it with it. And that's the assignment and transfer of an unfunded loan commitment number 14 on the agenda.

THE COURT: So 13 and 14 are in tandem? That's the military assignment thing.

MR. KESSLER: Yes.

THE COURT: All right. Obviously the MSB, cash collateral we're holding. Mr. McMahon is still trying to deal with the ordinary, is it the ordinary course, ordinary course issue. And we have an issue with the wages motion. All right.

MR. KESSLER: So if it's acceptable to Your Honor, I would like to begin now with the wages and benefits motion.

THE COURT: That's fine.

MR. KESSLER: If I can just have a moment. I've been asked if we should instead begin with the sale of the servicing business because I believe that's the central issue that is keeping everyone here today. And they probably let a lot of people go if we do that one first.

THE COURT: How long do you think that will take; awhile?

MR. KESSLER: Hard for me to guess. It could take a half hour, it could take two hours.

THE COURT: All right, I think I have, I have all the way until 7:00 p.m. tonight. So I don't want you to be in, you're going to run out of time at that point. So you manage the calendar, you manage the calendar however you wish. It's your hearing.

MR. KESSLER: I want to do those two as the next two, sale servicing and wages and benefits. If I have to push things, I don't want to push those too. So I'd like to do - -

THE COURT: Okay very good. However you want to proceed. So we'll do the sale?

MR. KESSLER: Yes.

THE COURT: All right.

MR. KESSLER: Item 16 on your agenda, Your Honor. So, Your Honor, this is the motion for the sale of the mortgage servicing business or what we refer to as the MSB business. As Your Honor will recall, we went to a bidding procedures process. And at the end of the bidding procedures, we did get one additional proposal and I'll discuss at length that proposal and how we get to where we are today. But I'd like to begin by saying that I'm pleased to report that after much negotiation yesterday, Berkadia is the proposed purchaser of the MSB business and for a price superior to the price that was originally in the asset purchase agreement that was attached to the put auction.

If I can just capture my notes here, I will. So, Your Honor, let me advise the Court of the process and how we are here today. 4:00 p.m. on Friday was the bidding deadline. The Debtors received two other bids prior to the 4:00 p.m. deadline. The first one was from Fannie Mae with respect to a proposed purchase of just certain IP assets. And another was from PNC-Midland with respect to the Debtors' mortgage servicing business but without a proposal to buy the Fannie Mae portfolio of servicing. Capmark as Your Honor knows had already negotiated a purchase agreement with Berkadia. And for a bid to qualify, it must have been no less favorable to the Debtors than the transaction contemplated with Berkadia. By 4:00 p.m. Saturday, which was the bid qualification deadline, the Debtors determined, after consultation with the Committee, that the bid from Fannie Mae was a non-conforming bid and was not no less favorable than the other bids and; therefore, was not a qualified bid. In consultation, again with the Unsecured Creditors Committee, we notified Fannie Mae prior to the 4:00 p.m. bid deadline. The Midland bid contained certain conditions and uncertainties that made it impossible for the Debtors to conclude that that bid was a conforming bid that was no less favorable than the Berkadia transaction. It had certain conditions and contingencies to closing that were risk factors, contained execution risks, and made it very, very difficult for us to compare the apples

to oranges bids. Based on discussions with Midland and its counsel and the expectation that Midland would amend their bid to make it possible for the Debtors and the Committee to bring that bid up to a qualifying bid, the Debtors and the Unsecured Creditors Committee agreed to extend the bid qualification deadline for PNC until 4:00 p.m. Sunday afternoon. After that 4:00 p.m. Sunday extended deadline and after further analysis of the respective offers, the Debtors and the Committee were still unable to conclude that Midland's bid was a qualifying bid. The Debtor and the Unsecured Creditors Committee agreed to amend the procedures to again extend the deadline until 9:00 a.m. on Monday which was yesterday. The Debtors informed Midland of those provisions in the Midland bid that prevented such a bid from being a qualifying bid. By the 9:00 a.m. Monday morning new bid qualification deadline, the Debtors and the Unsecured Creditors Committee received a letter from Midland amending their prior bid. The Debtors and the Committee again sat down at length and mutually determined that the revised Midland bid was still not a qualifying bid. Based on discussions with Midland and its counsel and the expectation that Midland would amend their bid to make it possible for the Debtors and the Committee to conclude that the Midland bid is a qualifying bid, we extended the bid qualification deadline again from 9:00 until 10:00, then from 10:00 to

11:00, from 11:00 until noon, and from noon until 2:00 p.m. And all the while Berkadia was sitting in our offices ready, willing, and able to go forward. And then lastly, we continued to negotiate with PNC from 2:00 p.m. until 6:00 p.m. last evening. At 11:15 a.m. Midland submitted another amended bid. The Debtors in consultation with the Committee determined that the revised bid was materially less favorable to the Debtors than the previous bid submitted by Midland. And so early in the afternoon, Midland verbally revised their bid by reducing the purchase price by a material amount. And this after, we believe, certain discussions and inquiries between Midland and certain third parties whose contracts would have to be transferred under the Midland proposal. The Debtors also learned that the favorable conclusion of the anti-trust investigation that had been initiated by the Department of Justice would not occur on Monday as previously expected increasing the Debtors' concern over certainty of closing. In addition, the Debtors learned that Freddie Mac would not be withdrawing their objection to any sale to Midland, again, further increasing execution risks for the Debtors associated with the Midland bid. The Midland team finally arrived at our office at 3:30 p.m. all of what I have described having taken place over the telephone and by e-mails. And prior to the last bid qualification deadline, the Debtors informed the Midland team of the terms that would be

needed to cause their bid to be a qualifying bid. At approximately 6:15 last night, the Midland team announced that they would not increase their bid and left our offices.

Now I will also advise the Court that during this entire period, we also tried to find a way to get the two parties on board so that PNC could buy that part of the business that it wanted and Berkadia buy the other part of the business that PNC did not want. Those negotiations also were not successful for a variety of reasons not all of which were necessarily conveyed to us. However, during the course of that day, Berkadia also increased its bid in an effort, I believe, we believe, to just have us cut off the bid extension deadlines that we continued to extend on behalf of PNC.

So after PNC decided they would not bid, we agreed to accept the Berkadia bid as they had proposed to amend it over the course of the day. And so I will now provide for the Court a summary of the revised terms.

The amended Berkadia asset purchase agreement delivers to Capmark an additional $100 million dollars in cash at closing. Sixty million dollars increase in value, and let me explain the difference. The original proposal provided that $75 million dollars of the value was to be provided in the form of a note. And Your Honor will recall that that note was subject to downward adjustment for losses

that may be incurred by Berkadia to Fannie Mae under the continuing loss sharing program of the Fannie Mae portfolio. As part of their revised bid, they agreed to replace that $75 million dollar note with $75 million dollars of cash which means that the Debtors, the sellers will not share in any of the Fannie Mae portfolio losses going forward but Berkadia will take a 100% of those losses, and we will get the full $75 million in cash. That note had been valued internally at approximately $35 million dollars. So that getting $75 million in cash for what we had valued as a $35 million dollar note increased our consideration by $40 million dollars. In addition, actually I'm off by five million, $30 million dollars. In addition, they gave us $25 million dollars in additional cash. The two numbers together if I have them right, should add up to sixty. And I know I didn't do it right, but it adds up to $60 million dollars of additional value, hundred million dollars of additional cash. So that we believe that the amended APA will today after all expected adjustments will realize value to the estate of $467 to $468 million dollars. And the old bid would have realized to the estate $407 to $408 million dollars, a difference of $60 million dollars.

Your Honor, we're here today to ask that the Court approve the sale of the mortgage servicing business to Berkadia under that amended agreement as I just explained or

described to the Court. There had been numerous, well I shouldn't say numerous, 16 objections filed to this motion. It's actually not a large number when we consider the many, many hundreds of notices that were sent out to counterparties to contracts whose contracts will be assumed and assigned by this transaction. I have for Your Honor - -

THE COURT: I'm sorry I counted 22, but let's a re-file, but some were duplicate. Perhaps that's where - -

MR. KESSLER: You're right. I made a mistake. There was a couple of later objections and one is a duplicate.

THE COURT: Okay.

MR. KESSLER: One was a re-file.

THE COURT: I'm sorry I interrupted you.

MR. KESSLER: I would like to hand up to Your Honor a summary chart that we have prepared of the various objections so that Your Honor can follow along with us as I go through them. Give me a moment, Your Honor.

THE COURT: Of course.

MR. KESSLER: Ah, we found it. May I approach, Your Honor?

THE COURT: Yes. Thank you. Do you have a copy for Ms. Werkheiser please? Ms. Werkheiser, am I correct?

MR. KESSLER: So, Your Honor, this is a - -

THE COURT: I'm sorry before we go through that what, what, how are you, what are you, back up try again. What evidence are you going to put on in support of the - -

MR. KESSLER: I plan to have the lawyer for Berkadia put on evidence of adequate assurance of future performance and, as well evidence of good faith for the 363(m) portion of the order.

THE COURT: All right. What about the sale process, the highest and best business judgment. I mean I can take your statements or representations I suppose as evidence but if someone wants to cross that would be awkward.

MR. KESSLER: Your Honor, there have been no objections filed to the process nor have there been any objections filed to the actual sale itself that are still pending today. All of the objections, I believe, relate to, relate to cure and adequate assurance as I go through this chart, but if necessary, again, I'll be glad to put on Mr. Fairfield who can go through the process.

MS. CATON: Your Honor, Amy Caton from Kramer Levin on behalf of the Creditors Committee. When Mr. Kessler finishes, we also have some comments about the process that I think Your Honor would find helpful as we were involved the whole way along and are a, an economically disinterested party other than trying to get the best deal for the estate.

THE COURT: I understand. Well is there any objection. I hate to be a stickler, you know, but I do need evidence to make the findings. Is there any objection to using Mr. Kessler's representations to the Court of the events that occurred as evidence in support of the sale motion? I hear none. So the Court will so move that into evidence or allow that as evidence.

(Debtor's Exhibit #1 received into evidence)

MR. KESSLER: Thank you, Your Honor. And it may be if Ms. Caton wants to give some comments relative to the Committee rather than, it may be helpful to do that now before we go through all these adequate assurance objections.

THE COURT: Very good; thank you.

MS. CATON: Thank you, Your Honor. As I said before, we were the Committee was an objective third party here. All we wanted was the best price for this business and with the lowest execution risk. And we didn't have any preference for Berkadia or PNC. We were indifferent to who won the auction. We were concerned that there was a lot of execution risks with PNC. And we very much wanted them to submit a qualified bid and commence an auction. And we gave PNC multiple opportunities to become a qualifying bid. As the Debtors, I think, I have told you through their statements we worked arm and arm with the Debtors over the course of the weekend and yesterday to make sure that there

was a fair and impartial procedure and were consulted every step of the way with respect to PNC and the actions that the Debtors were taking with respect to PNC. They just simply never submitted a bid that was qualified and despite every communication that was made to them about what needed to be done. And we believe that Berkadia's offer and their revised sale agreement constitutes the best possible result for the Debtors' estates here.

THE COURT: Thank you.

MS. CATON: Thank you.

MR. KESSLER: Your Honor, the chart that I handed up is a summary of the objections and our responses to those objections. As Your Honor might imagine, this is a dynamic process and so a number of matters have been addressed and even resolved since we prepared this chart very late last night, early this morning. And I will update you with those updates as we, as we move along if that's okay.

THE COURT: Well I'm wondering whether we should put on the adequate assurance evidence before we go through the objections since many of them were adequate assurance objections. Why don't we complete the factual record before we work our way through the objections.

MR. KESSLER: Okay.

MR. CORNELL: Good afternoon, Your Honor, Jason Cornell, Fox Rothschild on behalf of Berkadia. Your Honor,

with me today is Tom Califano. I'd like to orally move his admission *Pro Hoc* and then represent to the Court we will submit papers after today's hearing.

THE COURT: Okay.

MR. CORNELL: Thank you.

THE COURT: Yes, granted. Welcome.

MR. CALIFANO: Good afternoon, Your Honor. Your Honor, I have with me Mr. Tom Mara who is an Executive Vice President of Leucadia National Corp. which is a 50% shareholder of Berkadia which is a joint venture of Berkshire Hathaway and Leucadia National Corp. He's been authorized to testify on behalf of Berkadia and act in connection with this matter.

THE COURT: All right.

MR. CALIFANO: So we'll call him for adequate assurance.

THE COURT: All right, please take the stand.

THOMAS E. MARA, DEBTOR'S WITNESS, SWORN

THE CLERK: Please state and spell your name for the record.

MR. MARA: Thomas E. Mara, M-a-r-a.

DIRECT EXAMINATION

BY MR. CALIFANO:

Q. Mr. Mara, how are you employed?

A. I'm employed by Leucadia National Corporation, 33 years Executive Vice President.
Q. And what is your relationship to Berkadia the purchaser?
A. I oversee the Leucadia's half interest in Berkadia.
Q. Okay. And have you been authorized to testify today?
A. I have.
Q. What, briefly what is Berkadia?
A. Berkadia is a joint venture formed 50/50 by Berkshire Hathaway Corporation and Leucadia National Corporation two publically traded companies for the sole purpose of the acquisition of Capmark Financial Services, mortgage servicing business.
Q. Okay. And how is Berkadia capitalized?
A. Berkadia will be capitalized at an amount equal to the purchase price which is about $515 million dollars less than the perdium adjustments plus working capital, so somewhere between $475 and $500 million dollars, half by Berkshire Hathaway and half by Leucadia National.
Q. Are Berkshire Hathaway and Leucadia National Corp. committed to support this venture going forward?
A. Yes, they have.
Q. Okay. Are you familiar with the put agreement that's the subject of these hearings today?
A. I am.

Q. Okay are you familiar with the obligations that Berkadia undertook under that agreement?
A. I am.
Q. Okay. Does Berkadia have the financial ability to meet these obligations?
A. Yes, they do.
Q. Okay. Are you familiar with the mortgage servicing business that Berkadia is purchasing?
A. Yes.
Q. Okay. Does Berkadia have the financial ability to run that business going forward?
A. Yes, it does.
Q. Okay does it, will it have the ability, excuse me, will it have the ability to perform the non-financial aspects of that business?
A. Yes. Berkadia intends to keep the entire company intact, all of the employees, of its systems, procedures, real estate, etc. etc.
Q. So it will be the same company - -
A. Same company, different ownership.
Q. Okay. Will Berkadia have, excuse me, Your Honor, will have a good capitalization after closing such that it can, so it can perform in the purchase business?
A. Yes.

Q. Okay. Are you familiar with the contracts and agreements that Berkadia will be assuming under the put?
A. Generally.
Q. Okay. Will Berkadia have the ability to meet the obligations under those contracts?
A. To the best of my knowledge, yes.
Q. Okay. Was Berkadia obligated to obtain certain approvals and consents from various quasigovernmental agencies?
A. Yes.
Q. What is the status of those approvals now?
A. As far as I know, they've all been obtained as of today.
Q. Okay.
A. With the exception, I'm sorry, with the exception of, I think, one or two licenses in the State of California or maybe one other state, but all of the federal approvals have been obtained.
Q. Okay. Has Berkadia received *intersum* approval from Freddie Mac?
A. Yes.
Q. Fannie Mae?
A. Yes.
Q. And HUD?
A. Yes.
Q. Okay. Were you involved in the negotiation of the put agreement?

A. I was.
Q. What was your involvement?
A. Painful. I was involved from beginning to end.
Q. All right could you explain why the process was painful or how it was painful?
A. It's, it took a long time, many, many days, nights without sleep, very difficult negotiations back and forth. If you read the put agreement and you'll see there's a lot of detail in there. And it's like every deal that you do very difficult.
Q. And were the Debtors advised was Capmark advised in this process?
A. Yes.
Q. Okay. Did Berkadia negotiate with the Debtors in good faith?
A. Yes.
Q. Okay. In your opinion was the price, the purchase price originally fair value for the assets?
A. Yes.
Q. That Berkadia was purchasing. Did Berkadia at any time take any steps to interfere with or influence the Debtors' marketing process?
A. No.
Q. Okay. Did Berkadia do anything to inhibit or discourage other bidders?

A. No.
Q. Did there come a time when Berkadia raised the proposed purchase price?
A. Unfortunately, yes, I understand from what I heard today.
Q. Could you explain those circumstances?
A. It was long negotiation yesterday; started early in the morning; ended early evening last night. And the way I look at it, we raised our price $65 million not $60, $65 million. But at the end of the day with $65 million a hundred million dollars more in cash.
Q. Has Berkadia operated in good faith throughout the process of purchasing these assets?
A. Yes, they have.
MR. CALIFANO: Your Honor, I have no further questions; subject to redirect.
THE COURT: Thank you.
MR. KESSLER: May I ask a couple of questions, Your Honor, just to complete the record?
THE COURT: In support of the motion?
MR. KESSLER: Yes.
THE COURT: All right.
DIRECT EXAMINATION
BY MR. KESSLER:
Q. Does Berkadia have any relationship with Capmark other than the purchase agreement?

A. No.
Q. Did in your opinion did Berkadia act at full arm's length in this entire negotiation with Capmark?
A. Yes.
Q. Are you familiar, Mr. Mara, with the requirements under some of the servicing contracts that the servicer have certain ratings from the rating agencies?
A. Yes.
Q. Have you been able to obtain on behalf of Berkadia the indicative ratings that are necessary to meet the requirements of the servicing contracts?
A. What we've been told. We met with the rating agencies and we have been told that upon actual purchasing of the company that the ratings will be reaffirmed.
Q. Okay and by that I mean, that's why I use the term indicative, that once you, the company, the ratings that they've indicated they'll give you, you believe they will give you?
A. That's correct.
Q. And it is correct, is it not as you, I believe, testified for Mr. Califano that your intent is to continue the operation of the Capmark mortgage servicing business with the same employees, the same software, the same buildings as is now operated by Capmark?
A. That's correct.

Q. So nothing will change but the ownership and perhaps the executives on behalf of the ownership?
A. That's correct.
Q. And to the extent that Capmark is able to operate the business today, is there any reason to believe on your part that Berkadia would not be able to operate the business in the same way?
A. No.
Q. Okay now you're familiar with the terms of the contract that require that Berkadia offer employment to Capmark's employees on at least as good compensation terms as currently are being paid by Capmark?
A. Yes.
Q. And are you aware that at our request we asked and Berkadia sent us a letter confirming that there were no secret deals, behind the scenes deals for the compensation of any of the Capmark employees including the executives?
A. That's correct.
Q. And is that true?
A. That's true.
MR. KESSLER: Thank you, Your Honor. I have no further questions.
THE COURT: All right, any cross examination by any party? Please adjust the microphone if you don't mind.

CROSS EXAMINATION

BY ARLENE ALVES:

Q. Good afternoon, Arlene Alves with Seward and Kissel on behalf of U.S. Bank National Association. I have a few questions for you. U.S. Bank, just so you know, we are party to over 250 servicing agreements where Capmark is the servicer. Your testimony was, if you can confirm that, your plan is to keep the servicing business intact, is that correct?

A. That's correct.

Q. And you indicated that you were familiar with the contracts that are to be assumed, is that correct?

A. That's generally.

Q. Generally, yes. Did you perform due diligence regarding the extent of the servicing contracts that were whereby Capmark was performing servicing?

A. Yes.

Q. And do you believe that you were given access to all of those servicing agreements?

A. I believe so.

Q. Do you believe that the APA that you've executed includes in the exhibit of servicing agreements to be assigned all of the servicing agreements whereby Capmark was performing servicing?

A. As far as I know the answer is yes. They've made us aware of the ones they were performing services on. They gave them to us. We're assuming that everything they're doing today, we I intend to assume tomorrow.
Q. Are you aware of whether there were any servicing contracts where Capmark is currently servicing which were excluded from the APA?
A. I'm not aware of any.
Q. Do you have an approach regarding any servicing agreements that were inadvertently excluded from the APA as to whether or not they would be included in your transaction if, indeed, Capmark is currently servicing under those agreements?
A. I think if it was inadvertent, it would be a mistake and we would correct the mistake.
Q. That's good to hear. You also indicated that you are in the process and have obtained certain approvals from quasigovernment and governmental agencies relating to servicing?
A. Yes.
Q. And I also believe you testified that you have contacted rating agencies for other rating agency letters that you may be required under the agreements?
A. Yes, I've personally met with the rating agencies.

Q. Are you aware that there may be other requirements in connection with the transfer of servicing under some of the servicing agreements?
A. I'm not sure I understand your question.
THE COURT: I don't either.
BY MS. ALVES:
Q. Let me restate that. Are you aware that under some of the servicing agreements in order to effectuate a transfer of servicing there must be approval from other parties?
A. Yes. We've had an extensive amount of lawyers, as you can imagine, working on this and every approval that's required to obtain, we are, have either obtained or are in the process of obtaining that we're aware of.
Q. Is it your intention to comply with all of the conditions in the servicing agreements relating to approval of the transfer of servicing?
MR. KESSLER: Objection, Your Honor, I think that calls for a legal conclusion. We believe that certain transfer requirements in some of the contracts may be [indiscernible]. And asking this witness to agree [indiscernible].
THE COURT: Sustained.
BY MR. ALVES:
Q. Let me restate that. To the extent there may be certain conditions for the transferring of servicing which you have

been, let me restate that. Are you aware of any conditions relating to the transfer of servicing which will, you do not intend to perform?

A. Everything that we know about, we intend to perform on. But I'm going to have to defer to my lawyers as to whether or not we require an approval or not an approval. Every approval that we are told that we are required to obtain is our intent to do so.

MS. ALVES: Thank you. I have no further questions.

THE COURT: All right, thank you. Any other cross, Ms. Counihan?

MS. TOLEDO: Laura Toledo, I'm on behalf of U.S. Bankcorp Community Development Corporation.

THE COURT: Yes.

BY MS. TOLEDO:

Q. I just have a question. Are you familiar with asset management and servicing agreements between the Debtors and Community Development Entities that are related to new market tax credits?

A. Not - -

Q. Do you have any knowledge of those?

A. Not personally, no.

Q. Are you, do you know, then I assume you do not know whether or not they are being assumed and assigned pursuant to the sale?

A. I don't. I'd have to go back and look at the details in the contract. I don't recall.

MS. TOLEDO: Okay, nothing further. Thank you, Your Honor.

THE COURT: You're welcome. Ms. Counihan.

BY MS. COUNIHAN:

Q. Good afternoon, my name is Victoria Counihan and I represent Anglo Irish Bank and Colligo Funding. They have a servicing agreement which was listed on the notice of cure and assumption and assignment. Do you know if the, if Berkadia intends to seek assumption and assignment of that agreement?

A. I don't know.

Q. You have indicated you had some discussions with rating agencies. Was Moody's one of those rating agencies?

A. Yes. I spoke, excuse me, Moody's I think I spoke to on the phone; Fitch and S&P I met with personally.

Q. And what did, what did Moody's tell you with respect to their indications of whether they would confirm the, the, whether the notes particular to this, this servicing agreement would be?

A. I didn't discuss specific servicing agreements. I discussed servicing in general with them and the ratings for the servicing operation.

Q. Have they provided any confirmation in writing?

A. And they won't until the deal, transaction actually closes.
Q. So they have indicated they will not provide any confirmation until after the closing?
A. All the rating agencies basically told me that they would provide a rack letter upon closing; at least they indicated that.
Q. Now if matters were to change between now and closing would Moody's have the ability to change their mind and not provide such a letter?
A. They can always change their mind.
Q. Last question, I think. A provision of the particular servicing agreement that Anglo has provides that if there is an event of default including if Moody's either downgrades or puts the notes under that particular servicing agreement on a watch list for downgrade that that would allow Anglo to terminate the agreement. Do you understand that you would be taking assignment of this contract if you're taking assignment of the contract subject to that provision so that if Moody's did not ultimately provide that letter that Anglo would have the ability to terminate the agreement?
MR. CALIFANO: Objection.
THE COURT: Basis? You need to be at a mike.
MR. CALIFANO: Sorry.
THE COURT: That's all right.

MR. CALIFANO: Your Honor, he already testified he wasn't personally familiar with that contract. There's at least one if not more legal conclusions embedded in that question.

THE COURT: I agree. I believe he testified that any legally, legal obligation that actually is a legal obligation under an agreement, they're going to assume. And I think he said he was going to assume all contracts although he may not be able to identify specific ones, is that correct, sir?

A. Yes, it is, Your Honor.

MS. COUNIHAN: Thank you, Your Honor.

THE COURT: You're welcome.

MS. COUNIHAN: That's the only questions.

MR. CALIFANO: Your Honor, I'm just going to stand here for - -

THE COURT: That's fine, that's fine. Well, never mind. Yes, sir.

MR. ROVIRA: Good afternoon, Your Honor, Alex Rovira from Sidley Austin on behalf of Wells Fargo Bank and Wachovia Bank.

BY MR. ROVIRA:

Q. The question I have is under the put option, does Berkadia intend to assume obligations under the servicing agreements that arose prior to the closing date?

A. I'd have to go back and take a look at the agreement, but everything that's in the agreement we intend to assume.
Q. So if there's a breach of the, that becomes, that arose prior to the closing date but it becomes known after the closing date, is that something that Berkadia will perform and honor?
MR. CALIFANO: Objection, Your Honor, that also calls for a legal - -
THE COURT: Yeah these are all legal questions okay. He's not going to know. If it's an obligation, it's an obligation. What the agreement says, the agreement says. And to ask this witness whether, I mean he said it half a dozen times now if it's an obligation, they're required to pay, they'll pay it. And if not, they won't, and they'll talk to counsel.
MR. ROVIRA: Understand, Your Honor, I just wanted clarity on one of the provisions in the contract in the put option. That's it, okay, thank you.
THE COURT: Okay, you're welcome. And I read your, I read the objection with regard to prepetition defaults and I understand the legal issue involved.
BY MR. HARBOUR:
Q. Good afternoon, Jason Harbour of Hunton & Williams on behalf of Bank of America as Trustee and Master Servicer. Just a couple quick questions, hopefully. You testified that

you met with or spoke with the rating agencies when you did so, did you discuss downgrades of the servicing entity or the underlying bonds and securitization?

A. The conversations were focused on the servicing company itself.

Q. Did you discuss at all downgrades of the underlying paper that was entered into with under the securitization agreements?

A. No.

Q. You indicated that you did due diligence with respect to the servicing agreements, correct?

A. Yes.

Q. Did you do, did you also do due diligence with respect to the servicing operations and whether there were any defaults under the servicing agreement?

A. I'm sorry, I don't understand.

Q. It was a compound question; I apologize. Did you do due diligence with respect to Capmark Servicing?

A. We did a lot of due diligence with respect to Capmark Servicing.

A. Did you do any due diligence with respect to whether there were defaults under the servicing agreements that you're assuming?

A. We did.

Q. And how did you do that, what did you do?

A. We had lawyers involved, discussions with the company, reading the papers, a whole host of different things.
Q. Can you be more specific?
A. Probably not.
Q. Fair enough. You indicated that Berkadia would be capitalized by the purchase price plus an adjustment, plus the working capital, correct?
A. Approximately, yes.
Q. What's the amount of the additional working capital - -
A. I don't know yet. Whatever it is, we'll capitalize it.
Q. You said whatever it is we'll capitalize it. Are there any agreements in place that would require Berkadia to do so?
A. Yes, I mean we have to provide the company with adequate working capital.
Q. What are those agreements?
A. You'd have to refer, you have to take a look at the contract.
Q. What contract?
A. The put agreement.

MR. HABOUR: No further questions. Thank you.

THE COURT: Thank you, Mr. Harbour. Anyone else? Last call? Mr. Kessler was blocking you. Yes, sir.

MR. LERNER: One day I'll grow up and be as tall as Mr. Kessler. Leib Lerner of Alston & Bird for Wells Fargo as Trustee for various securitization trusts, and I just have a

couple of questions that might have been overlooked before or missed.

BY MR. LERNER:

Q. When you were performing diligence into the Capmark Servicing Business did you do any diligence on the actual operations and how those operations work?

A. Yes.

Q. And did that include operations having to do with the business's relationship with the Trustees for the various securitizations?

A. Yes.

Q. And did that also include any reporting requirements to those Trustees for any defaults that might occur under the servicing agreements?

A. Yes.

Q. Can you briefly describe what those procedures are?

A. Again, it's a whole host of lawyers and people reading documents, discussing with the company, discussing with the company's lawyers. When I say the company I mean the servicing operations, the people who actually do the work, talking to their IT people, looking at their systems, etc. etc.

Q. Did you get any sense of timing of how long it might take from when a default might occur until the business would end up reporting or making a report of a default to any of the

Trustees?

MR. CALIFANO: Your Honor - -

THE COURT: What's the relevance? What's the relevance of the question?

MR. LERNER: Your Honor, the relevance is that Wells Fargo as Trustee has objected to the fact that there are, that there might be latent defaults that would not be necessarily found out for a length of time. And if, and if actually, if Mr. Mara did perform diligence then into that then he might have an idea of how long it takes from when a default occurs until when, until when the business is actually able to inform the Trustee. There's a whole host, it's a big business, there's a whole host of procedures. So that's why I believe that this question is relevant.

THE COURT: So maybe I can rephrase it for you. Are you, based on your due diligence, are you generally aware of how long it takes the servicer to inform a Trustee of any defaults under a mortgage?

A. I'm not, Your Honor, but however way the company operates today would operate the same way in the future. And they serviced $260 billion dollars so there's a lot of people involved. And if there's a default, I guess when they found out the default, they notify you immediately, but can I swear that that's done in every instance; of course not. But we don't intend to change any of their procedures.

Q. And when you say that you guess they notify immediately, you don't know any timeframe of how the notification would go, is that correct?

A. I would hope that they would abide by the contract and notify everything within a timely fashion, but I can't guarantee that they've done that historically or they'll do it into the future. There's a thousand people that work for the company.

MR. LERNER: Thank you. No further questions.

THE COURT: I have a, I'm sorry, not related to your questions, but I have a clarification question to make sure I understand. In connection with the securitization trust you're buying or assuming the responsibility to service the mortgages contained in that trust on behalf of the Trustee of the securitization but you're not taking any obligations in connection with the actual securitization trust itself; i.e., running it, selling it?

MR. MARA: No, Your Honor.

THE COURT: Okay. How did the distributions flow from the PNI into the mortgage to the securitization trust, do you know did they go through the Trustee? Does anyone know? I don't know either. I can't remember from two years ago in American Home. Okay that's fine. Any, any redirect? I'm sorry, any other cross? All right.

MR. KESSLER: If I may ask just one question to, to clarify one thing.

THE COURT: Okay redirect.

REDIRECT EXAMINATION

BY MR. KESSLER:

Q. Mr. Mara, when you indicated that Berkadia will capitalize the company with additional working capital, does that include sufficient capital to meet all the servicer advances that will be required to operate these contracts?

A. Yes.

MR. KESSLER: Thank you. Your Honor, if - -

THE COURT: Any further redirect? All right, you may step down.

MR. MARA: Thank you, Your Honor.

MR. KESSLER: Your Honor, if at this time, I think it would be appropriate for us to ask for a ruling from the Court on two issues that need to be, that we need to prove today. The first is the good faith purchaser requirement and you heard Mr. Mara's testimony that this was an extensive arm's length negotiation using his words painful, that there is no relationship present or in the past between the parties. There were no secret dealings and in addition, there are no secret agreements between Berkadia and the employees that are being hired under the agreement. In addition, since Berkadia is the only party purchasing, I

believe that we can meet the requirements of, I think its 365(n), anyway the no collusion factor. And so based on the evidence and the fact that there is no evidence to the contrary, we would ask Your Honor to make a finding that Berkadia has acted in good faith and is entitled to the benefits of Section 363(m) as a good faith purchaser.

THE COURT: Any objection to the Court making that finding? I hear none. I'll make that finding.

MR. KESSLER: Thank you.

THE COURT: Is there any other evidence that any party wishes to submit in connection with this motion? I hear none. That will close the evidence for this. Let's go through the objections.

MR. KESSLER: The second thing, Your Honor, I was going to ask for a finding on is the adequate assurance of future performance. What you heard in the cross examination by several people - -

THE COURT: Hang on - -

MR. KESSLER: Was an effort - -

THE COURT: I'm sorry. Are there any, is there any party still objecting to a finding of adequate assurance and future performance? Yes, okay. Well I'm not going to make that finding yet.

MR. KESSLER: Okay you want to hear argument on it now or at the end?

THE COURT: Let's take that first. Yeah tell me why and then I'll hear any objection to the finding.

MR. KESSLER: I have two basic points to make. First, when the statute says adequate assurance of future performance, we need to underscore the word adequate. It doesn't say guaranteed performance of future performance. It says adequate assurance of future performance. And I think Mr. Mara's testimony more than meets the standard that this, that this purchaser will adequately assure future performance under the contracts. First and foremost, Capmark has been performing up to this date as one of the top servicers of commercial real estate mortgages in the country as you've heard in this hearing, and I'd ask the Court to take judicial notice from other hearings. There has been no objection to Capmark's ability to perform these contracts. Berkadia is simply acquiring the mortgage servicing business lock, stock, and barrel not just the contracts but the people, the software, the buildings and, as Mr. Mara testified, is doing nothing to change the continuing operation of the company. So assuming we get past the, the capital requirements, the liquidity requirements which I'll come to in a moment, I cannot see how they could fail to meet the adequate assurance of future performance test when all they're doing is picking up the company lock, stock and barrel and changing the name at the top and perhaps putting a few new and different

executives in at the top; same management over the servicing, same employees doing the same business as they did before.

Second, you heard people trying to attack adequate assurance of future performance by asking Mr. Mara if they, if he is familiar with certain provisions of the contract, whether or not those provisions have been met on a going forward basis. I believe that's part of the adequate assurance test. Once this, the Debtor assumes and assigns those contracts as hopefully the Court will authorize us to do, the contracts, as the Court is fully aware, do not change in any way. The contracts will be assumed by Berkadia as is, where is. And if there are servicing requirements going forward, if there are servicing standards that are required of the bonds for a particular CNBS going forward and those ratings are not obtained or are downgraded, that will be Berkadia's risk on a going forward basis. It is not a test of whether or not this Debtor should be able to assume and assign those contracts to Berkadia. What I think we have to determine today is whether Berkadia is giving adequate assurance of future performance not guaranteed assurance of future performance. If they want to spend a billion dollars on this company and then default six months later on account of a servicing downgrade, that's their problem going forward, but we - -

THE COURT: Only hedge funds do that.

MR. KESSLER: Beg pardon?

THE COURT: That only hedge funds do that.

MR. KESSLER: Well then we should have asked Mr. Mara if Berkadia is a hedge fund and we can get past that hurdle. So, Your Honor, the last point I want to make is several of the parties tried to make a case on the adequate assurance evidence relating to their, to their default objections and the requirement that the Debtor cure the defense. These objections as we'll come to when we go through the various objections relate in many instances to counterparties who have said we don't know of any defaults. We're not aware of any defaults. We just can't accept the fact that the Debtor says the amount is zero. And as a result, we want to hold the Debtor hostage by requiring the Debtor to put up some kind of huge escrow in case we find that there's a default later. They have the burden of proof if they don't believe that our cure default notice was accurate. And if they wanted to, they could have done the proper investigation. We have not heard here that the Debtor has defaulted in any way forward and trying to attack adequate assurance of Berkadia by asking them if they're going to be liable for some cure default going forward or asking them legal questions about how the contract will be viewed after assumption. I don't believe reaches the issue of whether they're providing adequate assurance of future

performance today to take these contracts. And so with that, I will leave it and I think we should leave the issues of default notices and cure amounts to a later part of the hearing and not allow it to encumber the argument of whether Berkadia is providing adequate assurance.

THE COURT: All right, does anyone wish to be heard on adequate assurance? Ms. Counihan?

MS. COUNIHAN: Your Honor, Victoria Counihan again for Anglo American or Anglo Irish Bank, Corporation PLC and Colligo Funding Limited. Your Honor, we have a servicing agreement with the Debtors and the servicing agreement does permit the Debtor to transfer and assign the agreement. But there's a clause in there that says provided that Moody's, which is our particular rating agency, has confirmed in writing that the transfer of the assets or the assignment will not cause a downgrade qualification or withdrawal of the current ratings that are assigned by Moody's to the notes that are issued by the servicing agreement. So the issue that I'm having based on the testimony is number one, the witness testified that when they spoke to Moody's they didn't even talk about the notes that were issued pursuant to the servicing agreement. He only talked about whether there'd be a downgrading of the servicer which is a different issue. And also this is a condition precedent in the agreement to the assignment happening. So we have no problem if the Court

would be willing to put provision in the order that says by the closing date that the buyer has to have obtained confirmation from Moody's in writing that that the, there will not be, that the assignment of this particular agreement will not cause a downgrading of the underlying notes. The problem is that there's no testimony what so ever and no proof that they can, that they can meet this obligation under the servicing agreement. Moody's has said that they won't provide confirmation prior to closing which is required by our agreement. The witness said that they didn't even discuss with Moody the downgrading of the notes that are the underlying notes. There's no evidence that the Debtors can comply with the servicing agreement requirement. And we really have no idea if Moody's is going to confirm this. And certainly they don't expect that it's going to happen by closing under any circumstances. So that's our issue with adequate assurance is this particular provision and their contract maybe is a little bit different than other contracts.

THE COURT: All right, thank you.

MS. COUNIHAN: I do also have a cure issue but I don't know if Your Honor wants to take that later.

THE COURT: Let's save that for later. I think the, let me respond to that. I think the evidence was clear that Moody's, Fitch, and S&P there were meetings with those

Parties that they indicated orally that they intended to reinstate the existing ratings upon closing, that they don't and won't provide a written agreement or commitment to do that prior to the closing. So I think that, in effect, this contract is out of touch with reality and, in effect, is anti-assignment clause that is void under the Bankruptcy Code because it's an impossible condition to meet. I think the evidence is sufficient to provide adequate assurance that that term will be complied with to the extent it's relevant to the parties which is that the ratings stay in place post sale. So I'll overrule that objection. Anyone else on adequate assurance? All right, I find based on the record before me that the buyer has provided and is providing adequate assurance of future performance under any contracts, leases, etc. to be assumed and assigned to them under this agreement.

MR. KESSLER: Thank you, Your Honor. And with those two rulings, I think that it will help us get through many of the objections. But if we can now go to my chart and start, I'll go through them numerically if that's okay with the Court?

THE COURT: That's fine. Does everyone have a chart that needs a chart? I think you have extras available, is that correct?

MR. KESSLER: I've given out about 15 or more copies in the Courtroom.

THE COURT: They're right there at the rail.

MR. KESSLER: No these are orders.

THE COURT: Do you have any extras?

MR. KESSLER: A lot of people have taken all the ones we have. We had a big stack of them.

THE COURT: If possible I'd ask you to share as good friends do when they have no other choice. All right, go ahead, Mr. Kessler.

MR. KESSLER: We had 15 and we gave them all out. Okay, Your Honor, the first one is the objection by Fannie Mae as counterparty to contracts under the desk program with the, Berkadia as the winning bidder, that has been withdrawn.

THE COURT: All right.

MR. KESSLER: Similarly with number two Freddie Mac, I understand has withdrawn its objection.

THE COURT: Okay, hang on. Okay, fine. If Mr. Kessler says something you disagree with, pipe up okay.

MR. KESSLER: The third one is an objection filed by Affiliated Commercial Solutions, Inc. an affiliated commercial service. And according to their objection, which I'll summarize very quickly, they claim that the cure amount for their prepetition invoice is $403,371.00 and not the $148,100.00 that we put into our, into our notice as a cure

amount. And the, we have now in response to this received the invoices from ACS's counsel, we have no objection to the invoices except a $15,000.00 invoice that is addressed to a Philippines Entity and we question whether that $15,000.00 is an obligation of the Debtor. But, nonetheless, under the procedures for dealing with disputes over cure amounts that is in Your Honor's prior order, a dispute over the cure amount should not stand in the way of the assumption and assignment in the contract. We will put the amount in, the, the - -

THE COURT: Asserted amount.

MR. KESSLER: Asserted amount in controversy and in escrow and we will deal with that dispute going forward. We believe we're $15,000.00 apart approximately.

THE COURT: So, in effect, cure amounts are for another day, but to the extent they're asserted, and I know there are some where they're asserted, if you will, in unliquidated or incoit way but dollar amounts, cure amounts and the asserted amount, you're going to escrow them and we're going to deal with it on another day.

MR. KESSLER: To the extent not already resolved.

THE COURT: Okay, very good.

MR. KESSLER: Number 4 is an adequate assurance objection and a cure amount objection. As far as adequate assurance, I think we've already, had resolved or have a

finding on that one.

THE COURT: And that's North Carolina Housing - -

MR. KESSLER: Oh I'm sorry, yes - -

THE COURT: Yeah let's identify for people maybe on the phone or others who don't have it in front of them.

MR. KESSLER: Yes sorry, my mistake, North Carolina Housing Finance Agency. This is one of those objections I believe, Your Honor, where they're saying they don't have the necessary information to object or not object to the cure amount. All I can say to that is that the Debtors sent out the notices with the information as contained in their own files. That the counterparty at this point has the burden to come forward and assert what they believe the cure amount to be. They have the burden of proof at this point. They get updated statements on a regular basis from the Debtor of its performance under their servicing contracts. And we object to all of these objections that simply say Debtor has the information; Debtor knows more than us; hold us up because we're not able to object to a specific amount. I would ask that that objection be overruled on that basis. We don't know of any better way to satisfy - -

THE COURT: I understand that. I'm not going to make a ruling on this until we go through the whole group of people who have this issue and I have an opportunity to hear from them if they wish. So I'm going to hold that issue in

abant until I hear from everybody. I don't want other parties to be prejudiced by the strength or weakness of a case that's put on by someone who just happens in front of them in the order. Having said that, does anyone wish to be heard on behalf of North Carolina Housing Financing Agency? All right, not being present, I will overrule the objection.

MR. KESSLER: Thank you, Your Honor.

THE COURT: And, again, adequate assurance has been dealt with so those objections are overruled.

MR. KESSLER: Correct. So number 5, R. Donnelly was withdrawn and is followed by a new objection that we'll come to later.

THE COURT: All right.

MR. KESSLER: Number 6, Colligo Funding Limited and Anglo Irish Bank was an adequate assurance objection that we've already heard from their counsel - -

THE COURT: I think I'm going to ask if she had a cure issue as well.

MR. KESSLER: Well as far as my chart is concerned - -

THE COURT: Well let's hear from Ms. Counihan.

MR. KESSLER: It's an adequate assurance and asking that we pay, get confirmation from Moody's or agree to pay the fees and expenses, but I don't see that there's a cure amount objection.

THE COURT: Well let's hear from Ms. Counihan.

MS. COUNIHAN: Your Honor, I think the latter part of what counsel has stated is our cure issue. There's a provision in the servicing agreement that provides that the Debtors will pay all costs of assignment and we believe that that should include any costs for legal fees or cost to pursue this objection and that should be included as a cure claim. And we can certainly provide the Debtors with an amount if they are escrowing amounts or, or if they have, you know, we can provide them with the actual dollar amount that we believe it's going to be. But we think that pursuant to the agreement, the Debtor is required to pay all of the costs of the assignment and that they should be required to do that. I don't have a dollar number for you today but I can certainly quantify that and give that to the Debtors so that they know what the dollar amount is. I presume it would go through closing anyway.

THE COURT: Mr. Kessler.

MR. KESSLER: Well, I guess this is asking for a second bite at the apple. She's asking that her attorney's fees be paid for an overruled objection.

THE COURT: No she's saying you have the obligation under the contract to pay the costs of assignment which she says includes her attorney's fees. So even if she hadn't

objected, I'm sure her client would have required her to review the documents, etc.

MR. KESSLER: So what I would propose, Your Honor, since we have not received any, any objection with a cure amount proposal different from what we have proposed is that they provide us with that information. We'll either agree to cure it by paying it or take the alternative that's available to us which is to put the amount in escrow and come back to Your Honor and deal with it at a later date.

THE COURT: Ms. Counihan, if you can provide them with an estimate offline.

MS. COUNIHAN: I will do so, Your Honor, and that's acceptable.

THE COURT: All right, very good.

MR. KESSLER: Number 7, Your Honor, is an objection by Wells Fargo Bank and this is one of those more problematic objections where they are saying, they are asking that because they're not able, so they say, to identify a specific cure amount different from what we propose that we be obligated to place a percentage of the purchase price into escrow with them for a one year period from which future identified breaches and defaults can be cured, that we should also guarantee that we will cover any deficiency and grant them an administrative expense claim for those deficiencies. And that the transfer of servicing to Berkadia be permissible

only if the Debtors cure all breaches that they may identify in the future. They're also asking that we pre-pay to Wells Fargo an amount that covers possible reasonably expected breaches or defaults. And that the APA be revised to require the buyer to assume all liabilities other than those currently known cure amounts that are satisfied by the Debtors prior to the sale. They go on to ask that the Debtor establish that we give adequate assurance of future performance which we have done. And they say that, that our lists of contracts for which we assert Wells Fargo as the Trustee and are to be assumed and assigned contains errors and that we need to correctly identify these agreements. I believe first that they're not entitled to any of the cure amount type of relief that they request. It would be an egregious burden on these Debtors to take the amount of purchase price that they are requesting, put it into escrow with them for as long as a year, and give Wells Fargo the opportunity for a year to try to identify pre-assignment defaults under their contract, obviously on the adequate assurance part that's already been ruled on by the Court. And I would also hasten to bring to the Court's attention here again that they have not identified any defaults under the contract. The Debtors claim there are no defaults. And they have the burden, if they believe that the Debtors have defaulted and have an obligation to cure, to bring forward

today in some form of written document what are the defaults so that we can see them and make some decision as to whether we will cure those defaults or chose not to assign the contracts. But to ask us to make a decision today to assign the contracts in a blind and possibly have millions and millions of dollars of future default obligation is not an obligation under Section 365, is not a remedy that we believe any counterparty to a contract is entitled to under Section 365, and we would ask that the Wells Fargo objection be denied in its entirety as we will similarly ask for a number of the other banks who simply banded together to make this same type of objection that by our calculation might require hundreds of millions of dollars be placed in escrow to satisfy the types of objections that they're asking for.

THE COURT: All right, Mr. Lerner.

MR. LERNER: Thank you, Your Honor. The first point that I want to make on behalf of Wells Fargo is we're not talking about Wells Fargo alone a small amount of, of money by the last calculation. It was over a hundred billion dollars in outstanding balance, but let's to take this, I guess, from a broader perspective. Counsel, Debtors' counsel called this banks or the Trustees banding together actually they share the same concerns. And I'm not speaking for them. I'm just speaking for Wells Fargo as Trustee, but the primary issue or problem that we're dealing with is Capmark has all

of these documents. The Trustees are entirely reliant upon Capmark for notice of any default. And as Mr. Mara admitted before, the procedures are, are unknown. Definitely Wells Fargo doesn't know them. It would be, you know, it would be nice if the Debtor or Berkadia knew how those, how those would happen, but we're looking here at the biggest problem which is what's going to be with defaults that exist or - -

THE COURT: Are we talking about defaults under the servicing agreement or are we talking about defaults under the underlying mortgage which would give rise to obligations of the servicer to advance the monies?

MR. LERNER: The latter is, is, I guess, the one that's more, more worrisome because of the latency of that. The, obviously the defaults that are going to be between let's say directly between Capmark that exists before, between Capmark and Wells Fargo. We don't know any of those to exist. It's, but the other defaults that would then give rise to reporting requirements, that would, that would give rise to requirements for Wells Fargo as Trustee, to then notify and take care, notify the investors for whom its trustee for under the securitization agreements and for all of the other tangential duties that the trustee has.

THE COURT: Let me, maybe I can cut through this. Counsel for Berkadia, if you could come to the podium. I

have a question. Berkadia is assuming the obligations of servicer under all these contracts.

MR. CALIFANO: Yes, Your Honor.

THE COURT: If there were defaults in the underlying mortgage that arose the default itself under the underlying mortgage arose prepetition and there were certain, in that instance there were certain notice requirements, there are also certain substantive requirements to front advance the losses, etc. that don't come to light until the post sale period. So you've got defaults on the underlying mortgages that may have arisen presale but don't come to light to your client or to the trustee to Wells Fargo or other similarly situated persons, is your client assuming the liability, i.e., the obligation that would arise under the servicing agreement in connection with such a default?

MR. CALIFANO: So is the question is my client assuming the obligation to make servicer advances for pre-November 24th defaults that may not be known or may not have been notified?

THE COURT: Yes.

MR. CALIFANO: I assume so. Let me check. Yes, Your Honor.

THE COURT: All right. Doesn't that solve your problem? In other words, the defaults are there. They may have occurred. They may be occurring as we speak. I think I

read today that one out of four U.S., of course this is commercial mortgages, but one out of four U.S. mortgages home mortgages is under water, probably mine too. And so but certain obligations of the servicer arise to deal with the borrower's defaults. And if they don't do that properly, I suppose that would, in effect, result also in a default under the MSA or whatever agreement is in place. But an adequately capitalized company is coming in and they're going to do the servicing job and if those obligations arise, they're going to pay them. I don't see what the possible issue could be for Wells Fargo, and I don't see why you need money put aside to pay as cure something that's going to get paid by the buyer as part of the ordinary course of business post sale if you know where I'm coming from.

MR. LERNER: I do understand where Your Honor is coming from. And it wasn't until a few moments ago it was unclear to me, and I believe to more than just me and, maybe if I'm getting it wrong now, maybe somebody else wants to stand up that Berkadia is assuming all of those liabilities even for prepetition what we're calling latent, latent defaults. But if that is correct, then I think that - -

THE COURT: I'm not trying to box them in. The contract says what the contract says.

MR. LERNER: Well, well and that's, and that's just it is that the way we read the contract and the way we read

the proposed order that's not what's happening here. If that it would be what's happening then I believe that, that the, that part of the objection would, would fall away. There would be a - -

THE COURT: Well let's say this. I am sure they're preserving all their defenses under the contract, the underlying contracts and if they have an obligation, they have an obligation. If they don't, they don't. If the Debtor committed some wanton act of, well I don't want to start hypothetical questions, but - -

MR. CALIFANO: Well, Your Honor, but the question was with respect to servicing defaults that aren't discovered and servicer advances that are not yet discovered because of an underlying borrower default, and I have confirmed that those servicer advances for undiscovered borrower defaults will be honored - -

THE COURT: And if you discover that, you know, default notice should have been given to the Trustee 60 days ago but you don't discover it until 30 days post closing, you're going to give the notice and maybe it's a non-monetary default. If it is, it is and they can do what they want and you'll have the defenses you have.

MR. CALIFANO: Yes, Your Honor.

THE COURT: I just I'm not trying to coy. It was less than clear to me as well, and I understand your issues,

but it sounds to me like this as a practical matter takes care of your client's problems.

MR. LERNER: Yeah much of it and then there would be also, of course, under the transaction documents the issue of attorney's fees and these things. And what I heard before from the Debtor is that they would deal with those in the ordinary course. And I think that if that is what they would maintain with Wells Fargo, then that would probably also resolve that issue.

THE COURT: All right, well if, you know, if you're entitled to the fees you are. And if you're not, you're not. And if you are, it may be a cure amount. It may be, somebody's going to pay. And either the Debtor is cure or the buyer in the ordinary course. But that's an issue, you know, I can't decide today. I don't know what your contract says about attorney's fees and whether it would cover everything in connection with the bankruptcy or not.

MR. LERNER: And to that, we would want to preserve our objection to the zero cure amount to the extent that that becomes an issue or that there are - -

THE COURT: Well here's what I'm going to do with that. If anyone wants to reserve that right, you need to give the Debtor a good faith estimate prior to closing. Otherwise, they don't know what to set aside. You know, you can't, I don't want to hear it now. I don't want to hear

what the bills are now, but I think prior to closing the Debtor needs to have an idea of what you're talking about because it affects, since it's being escrowed, to deal with at a later date it's going to affect what needs to be escrowed and what can be distributed.

MR. LERNER: I think with that, that that concludes everything that I needed to say.

THE COURT: Now I want to hear from anyone else right now is the time to deal with this. I'd like to hear from anyone else on this cure claim zero defaults that may have arisen that need to be paid. And Mr. Harbour is behind you, Mr. Kessler.

MR. HARBOUR: He's a pretty big guy I don't know. Your Honor, for the record Jason Harbour, Hunton & Williams again on behalf of Bank of America as Trustee and Master Servicer. I'm not sure that the entire question was answered with respect to the cure issue. There are potentially cures by or default for other bi-borrowers and it's great that if those defaults by borrowers happen pre-closing that the purchaser will make servicing advances. That certainly resolves that concern. Our concern, however, primarily focuses on specific defaults made by Capmark with respect to their servicing obligations.

THE COURT: Do you know of any?

MR. HARBOUR: Yes, we do know of one. Capmark did

not inform us of it. In fact, the certificate of holder informed us of it that Capmark failed to make escrow deposits in the amount of a $131,000.00 per month for two and a half years which has aggregated to a $3.8 million dollar deficiency in an escrow account which, you know, could substantially obviously impact the value of that loan. Now that's just one example in 57 hundred loans that we have but that's a default. And there are other potential defaults, Your Honor. They could have, it's very easy to conceive that they might have failed to pay an insurance policy. The policy dies and there's a fire. There's a casualty, and that's just a loss. And that would be directly Capmark's responsibility and to say that we've got to come up with all of the information in 20 days when we don't have the information, Your Honor. What Bank of America is Trustee and Master Servicer from my understanding receives are monthly statements and those monthly statements go to principal and interest. They go to, you know, whether certain payments have been made. Then at the end of the year, then there's an annual audit, Your Honor. So the last annual audit that's done by an accounting firm was received March, approximately March 15th, 2009 not only covered 2008; notably, Your Honor, that didn't pick up the $3.8 million dollar default that we now know about. Instead, it said everything was fine but we don't even have that right now, Your Honor. We don't have

from the servicer information about whether they've done servicing properly because we won't know that until they've done their annual report. So what we're asking for, Your Honor, isn't that we hold the Debtors up or tie their hands behind their back. We're asking that we receive an administrative claim for any cure amounts that we subsequently discover. We're asking for an appropriate time period to try to investigate whether such breaches have occurred. And, Your Honor, hopefully, very much hopefully the $3.8 million dollar one is the only one with respect to our loans that would be fantastic, and we'd love for that to be the case. And in that instance putting an appropriate size escrow account and granting us administrative claims costs the Debtors nothing. If, however, Your Honor, it turns out that there are substantial defaults and, Your Honor, this is somewhat different than the residential mortgage context because each loan here, you know, not only is probably at least a few million dollars but could be tens if not hundreds of millions of dollars. So even though there may not be a lot of defaults one or two defaults, 10 defaults could quickly add up to $50 million dollars if there's substantial defaults that can rise to huge losses. Now the Debtors, Your Honor, are the parties that know this information or that have the information if they choose to go look at it to find out whether defaults occur. We simply don't have that

information, Your Honor. So as I was saying a moment ago, we would request that Your Honor set up a time table that we can agree on a time table with the Debtors to try to figure out whether any defaults have really happened. Maybe discovery is necessary. Maybe we can agree to an appropriate process whereby we look at the annual audit. But something so that we have some real information so that Bank of America as Trustee and the other trustees can say they've really done their duties to protect the certificate holders and the security holders and that they're not cut off inappropriately. I mean the Bankruptcy Code requires the Debtors to cure defaults. And there hasn't been enough time for us to determine whether their defaults exist.

THE COURT: If there has been a default, the Trustee may not assume unless at the time of assumption it cures. Now that to me, and I think the law would agree, that if you've got an incoit unliquidated default that you haven't asserted yet, it's, it can't be that that contract can't be assumed or assigned or we would never be able to assume an assigned contracts under the code ever. And we do it all the time.

MR. HARBOUR: I'm not disagreeing with Your Honor. You have me at a little bit of disadvantage. I don't have the code in front of me right now. But it also those sections of 365(b)(1)(a) and (b) I know talk about providing

adequate assurance of cure and that's what I'm talking about here. I'm talking about providing adequate assurance that they will cure, that they can cure, not that we're going to be cut off and that three months from now, six months from now - -

THE COURT: I'm not sure if you discovered the default six months from now it would be a cure claim. I mean I don't know if that's the case.

MR. HARBOUR: Okay, Your Honor. It seems to be that if there's an unknown default that it needs to be cured or they should be providing adequate assurance that it's cured. It's my understanding that the Courts regularly escrow funds and provide claimants with administrative claims for situations where the contract may be such that the parties can't know because of the extendency of the sale process whether defaults have occurred at the time.

THE COURT: Okay.

MR. HARBOUR: So that's really what we're asking for, Your Honor.

THE COURT: All right.

MR. HARBOUR: And with respect to tying the hands, I'll go one step further and indicate that we've, I've discussed it with I think counsel for Wells Fargo, U.S. Bank, some of the other Trustees and a cure amount of, a total of $60 million dollars for all of the objecting parties to our

minds would be appropriate here as long as we also receive an administrative expense plan. And that's not the end of the world for the Debtors because they haven't proposed a plan yet. They're not looking to come out of bankruptcy yet. At that point, okay we'll have had a process. We'll have looked at it, and we'll have been able to do the due diligence to determine whether any defaults have existed, but this process is just too fast and not appropriate. Thank you, Your Honor.

THE COURT: You're welcome. Anyone else on this issue?

MR. BENEDICT: Your Honor, this is Mark Benedict on the telephone for GE Capital.

THE COURT: Yes, sir.

MR. BENEDICT: I think my issue is a lot more limited, Your Honor. My client did not receive the necessary documentation under the servicing agreement, the financial information from which we could determine whether there was a cure. Very early in the case, we requested that information from Capmark. Right about the time this hearing commenced, we were provided about a 150, 160 pages of documents which was the financial information we had requested. We're going to need a short period of time to review that and then let the Debtor know whether we think there is or is not a cure. We believe we can do that before closing. And if there's a dispute, we certainly can have that amount escrowed if

there's a dispute as to the amount. But we think between now and closing, we can identify if there is a cure amount issue outstanding.

THE COURT: Okay. Anyone else?

MS. ALVES: Your Honor, Arlene Alves again for U.S. Bank as Trustee. We share in the concerns that were raised by Mr. Lerner and by Mr. Harbour. We do believe here that this information is exclusively within the control of the Debtors. And we have, I believe, we, there are situations where these types of service defaults would not come to our notice, would not become, we would not become aware of them for a significant period of time, so we believe an appropriate process to protect our interest should be provided here. To the extent the Debtors are correct, you know, we're not going to be taking any of the valuable estate resources. They will end up keeping all that money. To the extent we have been harmed and we had no way of knowing the harm, we will be compensated and provided our adequate assurance. I would also like to point out we have a separate issue here which is with respect to the U.S. Bank transactions. We've gone into great detail in our objection. We have been, we have not received cure notices for all those transactions which our records indicate are being serviced by Capmark. We have undertaken tremendous efforts both with Debtors' counsel and with the 19 different offices of U.S.

Bank that are involved here to try to reconcile that and to determine that, and we are looking for assurances that to the extent Capmark is servicing and we have not been able to identify those transactions that they're included, and that to the extent cures are appropriate that we be provided with a cure.

THE COURT: All right. Thank you. Anyone else?

MR. ROVIRA: Good afternoon, Your Honor, again, Alex Rovira from Sidley Austin on behalf of Wells Fargo Bank and Wachovia Bank in their capacities as master servicers and sub-servicers over a 100 other servicing agreements. Your Honor, we share the same concerns that were raised with respect to the default and latent default breaches that may have occurred. Prior to the assumption that we are not aware of which we may become aware of post to assumption and which we believe that there should be an adequate process in order to provide for that cure amount. We don't think that there's anything in the Bankruptcy Code under 365 or the case law that would allow the Debtor to say okay on this date tell me how much you're owed and if you don't tell me, you are forever estopped from recovering that amount. We don't think that's what the Bankruptcy Code provides for. We think that to do so would be, to allow the Debtor to get more than the substantive rights that are under the contract. It would allow the Debtor to create a clean slate and a more valuable

asset which we do not believe is what the Bankruptcy Code provides for. I think the fact that other cases have provided a reserve or an escrow amount in order to handle cures or latent or unknown objections is evidence that there are these concerns specifically where - -

THE COURT: Can you point me to a case where the Court has required escrows to cover potential latent or undiscovered claims?

MR. ROVIRA: Well, Your Honor, mine has been - -

THE COURT: I heard a couple times now it's been done so I'm not aware of it ever being done.

MR. ROVIRA: Well my understanding was and, Your Honor, will be more learned than I am on this, in *American Home* and in *Homebanc*, they were unable at the time that the cure amounts, the notices were issued to be able to provide an accurate accounting of what the cure amount was at that time. And I understand that the Court ordered a process of 30 days okay make it a good faith effort to try to estimate what those latent or unknown cure amounts may be. I, so I think that's a process that kind of evidences that there's, there's that possibility. But I don't think the Bankruptcy Code says you're estopped if you have a latent or unknown claim. I think the Bankruptcy Code and the case law specifically provides, well it doesn't specifically provide, but provides that the contract is to be assumed in full. And

the non-debtor counterparty is supposed to get the full benefit of its agreement.

THE COURT: Doesn't it come down to who pays the bill? It's not that you don't have a claim. It's not that you won't be able to exercise your remedies if you're harmed by default. You want to enforce the default, but to me and there may be limitations of course, but to me I've heard loud and clear from the buyer that in everything I'm hearing that people are worried about, they're going, they're assuming whatever liability there is. Go ahead, sir.

MR. CALIFANO: Your Honor, I just want to make it clear - -

THE COURT: Well and let me just say with, subject to defenses I mean if you, if you, if you're buying a pig in a poke, you know, there's no way for you to know.

MR. CALIFANO: Right but, Your Honor, when, the contract does not provide that we're taking on pre-closing liabilities.

THE COURT: Right.

MR. CALIFANO: What we are agreeing to do, I thought I made it clear, I'll make it very clear. To the extent there are servicer advances which come due as a result of an underlying borrower default that has not been discovered as of today and is discovered in the ordinary course - -

THE COURT: You'll pay this.

MR. CALIFANO: We'll pay those servicer advances.

THE COURT: I understand.

MR. CALIFANO: We're clear?

THE COURT: No, no I think that's helpful for the record. You know, it's really difficult for me here and I don't know what to do about this, this is, everybody's being very amorphous. There may be something that arises under my agreement which I don't know about which might be a default, and I'll know in a year, and if that's a problem then the Debtor has to pay me an admin claim. You know at some point the music has to stop in a claim, it's a default claim that's so incoit that it can't be articulated. It simply can't hold up the process of getting this, these contracts assumed and assigned, figuring out what the cure amounts are, and going forward. I mean you can assert, maybe you can assert admin claim at a later date, but I don't see why I have to require escrow - - let's put it this way. If an admin claim arises at a future date as a result of the default that wasn't cured that you can come in and prove me, prove up to the Court you'll have an admin claim. Why should I, why should you, why should you be in a special position as any other admin claimant. There are other admin, the lawyers when they have a carve out, every other admin claimant is coming in here will get paid. And it's a timing issue. It's an escrow issue, but that's for another day. I'm not saying they don't

have to cure. I'm saying that in my mind now is not the day to deal with it, and I don't see any evidence or any argument today that would make me think, you know, it's so likely that it's going to happen. And it's so likely this estate is going to dissipate that in order to protect these potential administrative expense claims, I've got to somehow escrow money now. I mean if they're claims that nobody knows about that arise later and they relate back to a period prior to the closing, I guess is I'm ruminating here a little bit, but I guess as a matter of law you'd have an admin claim.

MR. ROVIRA: Well that's where I don't know if there's clarity. If we would have an admin law we, an admin claim and we could provide for that in the order, I think we would be satisfied with that. I think a Debtor and my concern is that the Debtors may say you're estopped from that. You had your opportunity to say what the cure amount was. You know, that was your time and moment. Now that something arose where it's, it's a lay in defect where it's, and, and to address the concern is not servicing advances only - -

THE COURT: I think you're right. I think borders generally provide that because there's no way for the Debtors to figure out if the transaction makes any sense unless they have some solid idea of what the cure claims are especially where the Debtors' liable as opposed to the buyers liable,

although the buyer usually wants to know too. I understand the conundrum. I understand that and you're put in a, you're put in a difficult place, but I'm struggling with the practical reality of how we go forward when you have claims that nobody knows what they may or may not be.

MR. ROVIRA: I understand the need for finality and the conundrum, but there should be a middle ground of finding a process of a year end, a year end audit if we're able to, to come up with at that moment a good faith estimate. The Debtors can object to that or just providing that any, if the agreement is assumed the latent or defaults, which may not ever, I'm not asking to make something hypothetical, based on a hypothetical, those would be treated as admin expense claims and not estopped. And the concern that the Debtor raised, I'm sorry that counsel for Berkadia was with respect to services advances, my concern is where the servicer Capmark was maybe misallocated certain funds that needed to go to a certain escrow account or the reserve account and now that claim comes back to me because the borrower now realizes on its account statement that something occurred, I'm not able to, our clients not able to figure that out right now and it may take certain time to figure that out. So just a reasonable way to get to the middle of a process for that, we believe would be an escrow or that they are granted admin expense priority without, you know, because it would be

treated as if the cure did occur, as if the breach occurred at that moment in time. Thank you, Your Honor.

THE COURT: You're welcome. Mr. Huston.

MR. ROVIRA: I'm sorry, Your Honor, one other thing.

THE COURT: Oh sure, of course.

MR. ROVIRA: If there's the other concern we had was with the exacts the contracts would be assumed and assigned. We have requested for some of the schedules that were attached if there's any amendments that were made to any of the servicing - -

THE COURT: Well I think the, I think the testimony was if there's a mistake they'll fix it.

MR. ROVIRA: Okay thank you, Your Honor.

THE COURT: Mr. Huston.

MR. HUSTON: Good afternoon, Your Honor, may I please the Court Joseph Huston at Stevens & Lee on behalf of Deutsche Bank Trust Company Americas. I don't want to re-plow ground that's been plowed before. I think Mr. Harbour pretty much got it spot on. And I just apropos my last colleague's comments, it would be very helpful if Debtors would identify which agreements and which defaults they thought existed. And this is not, I don't think it's with good grace that we raise the objection that said you didn't tell us what the defaults were and they say not my problem it's your burden. In their notice, notice of auction and

sale hearing which is docket #148, this, this in paragraph 2 it says, the Debtors believe any and all defaults under the assumed contracts and leases can be cured by the payment of the cure amounts listed on Exhibit A. So they think that there is a default, otherwise, we would not have been on that list.

THE COURT: No, no, no, no. That is completely unfair.

MR. HUSTON: Well otherwise why would they have listed a cure amount. I mean a cure amount has to be listed - -

THE COURT: A cure amount of zero?

MR. HUSTON: It has to be, but it has to be to cure default otherwise there's no default.

THE COURT: So that you, come on you know, Mr. Huston, you've been practicing longer than I. You know that every Debtor does that to make sure that every contract is covered. And that it's subject to in effect the statute of limitations or a bar date on asserting a default at a later date.

MR. HUSTON: Well we have, we have a non-objecting party who specifically has said that the Debtors have not meaningfully identified any defaults and it'd be real easy for them to say Deutsche Bank no defaults. We don't believe

there's any default in your contract in which event we would then, we would then simply - -

THE COURT: Haven't they said that by putting it at zero? I mean they have an obligation under the rules to make these statements in good faith. And if they think its zero haven't they said we think it's zero. If there is a default, which we're not acknowledging, it will be zero. Isn't that what the whole point of that exhibit is?

MR. HUSTON: I disagree, Your Honor.

THE COURT: Okay.

MR. HUSTON: Respectfully. Second, with respect to this issue about the incoit defaults that you raised, I think you're absolutely right. If you have, if you have something that might with the passage of time become a default then I don't think it is subject to cure. The contract can be assumed and assigned. But with 365(b)(1) says if there has been a default and the concern here is if there are defaults that have occurred but we don't know about them yet.

THE COURT: I understand. I understand.

MR. HUSTON: Finally in, I believe you asked for an example and I believe in the *DVI* financial case which was a, was a real, was a mess. It was a series. It was two different lines of business and there were, and there were servicing agreements that were assigned. And then there were actual direct loans which were made by the other ARM. We

represented an Ad Hoc group of noteholders and servicers and, if my memory serves me correctly, there was a short process by which if you were able to identify cure costs those were set aside subject to having notice in the hearing to see who could prove them up and actually be entitled to them.

THE COURT: All right.

MR. HUSTON: But I'm not aware of any other case.

THE COURT: Okay, thank you. Ms. Harris. Good afternoon.

MS. HARRIS: Good afternoon, Your Honor, Donna Harris on behalf of GMAC. I thought it might be a good time since we did file an objection with respect to a zero cure in the servicing agreements to let Your Honor know that the business people did actually resolve those issues. And just prior to the hearing, we did file a formal withdrawal of our objections so we won't be going forward on our objection to this issue.

THE COURT: Thank you, anyone else? Mr. Kessler, a reply, to a - -

MR. KESSLER: Briefly, Your Honor.

THE COURT: - - a long list of arguments.

MR. KESSLER: Briefly. First, let me make clear on the record that where we sent out notices of assumption and intent to assign contracts and put the default amount as zero, that means we do not believe that there is any default

that is in need of cure. If we did not, if we thought there was a default and didn't know the number, I believe we would have put unknown not zero.

Second, to a large extent this is a red herring because none of these parties here today have indicated that they have, before they received the notice been in contact with the Debtor of the Debtors' failure to remit the ordinary remittance reports that come to them from the servicer on a regular basis where the servicer reports on the monies that were received and how the monies were dispersed and the advances that were made and so forth. They have information. None of them came back to the Debtor and said, or to this Court, and said we believe there is a specific default, except for this relatively small amounts that we heard, a few million dollars, three hundred thousand. None of them have come back and said we believe there has been a default and this is it. This is the default. We just don't know what the amount is. They have just asked the Court to recognize that they, they have, they have rights to go forward and get some form of an escrow and administrative expense if it comes to their attention at a later date. Now if I understand correctly what they're asking for, they're asking for two forms of relief. Put $50 million dollars of the sale proceeds in escrow against which they can get cures of any defaults that they may identify over the next one year

period. And second, to the extent the $50 million dollars is not sufficient, give us an administrative expense for the excess. Well that would be such an egregious burden on this Debtor that we wouldn't, I believe, know whether to even go forward and assume and assign their contract. We might even prefer to reject them under those circumstances because we have no idea what it would cost us or the estate on a going forward basis to, to meet that obligation and that remedy. So I think that they have at least some burden to come forward and identify what the default is, give us an opportunity to look into it and see whether the amount is reflective of something that's worthwhile assuming and giving them the right to an administrative expense or even rejecting. The way they've done it we're on the horns of a dilemma because there is on limit as far as they're concerned to our obligation. They may take the entire sales proceeds for all we know.

THE COURT: Right.

MR. KESSLER: So as I said, it is a red herring. None of them have said we have tried to terminate this agreement because of your bad behavior. We know that there are defaults. We just don't know what the amount is or anything of that sort. It's just an effort to protect themselves because they got a one time opportunity from a Chapter 11 Debtor who says we're going to assume your

contract for them. To say I have an opportunity for Deutsche, I'm going to try to freeze everything you get so that we can try to collect every penny that we may be entitled to under any legal theory going forward. That's just not the law, Your Honor. And I'm not aware of any case in which that has been, that type of remedy has been offered.

THE COURT: Okay.

MR. BENEDICT: Your Honor, this is Mark Benedict on behalf of GE Capital. May I briefly respond to Mr. Kessler?

THE COURT: No.

MR. BENEDICT: Okay.

MR. MAYER: Your Honor, Tom Mayer for Kramer Levin the Creditors Committee. I need 30 seconds to confer with Debtors' counsel. May I take 30 seconds?

THE COURT: Yes.

MR. MAYER: Thank you, Your Honor, the Debtors will deal with my issue when they see fit. I'm sorry to take the time.

THE COURT: No problem. All right, I'm going to overrule these objections based on the idea that there are claims for defaults that may arise under the servicing agreements that have not yet been identified for whatever reason. I find that 365(b) requires, of course, that if there has been a default it be cured but it actually says, "if there has been a default in an executory contract, the

trustee may not assume such contract or lease unless at the time of assumption such contract or lease the trustee cures that default." There has to be a stop date. There has to be a stop the music date on issues of cure in connection with the assumption and assignment of leases and administrative expense claims. Otherwise, you simply couldn't do it. And the code clearly provides that you can. And, indeed, I take issue with some of the tone, and I don't mean that pejoratively, but some of the underlying rationale that somehow the Debtors don't get special rights in connection with 365, of course they do. That's the whole point. The Debtor can pick executory contracts and leases where it would be advantageous for them to assume or assign them, and it can reject and cure, if you will, its bad business judgment with contracts and leases that it doesn't make sense to go forward with. It's a fundamental piece of the Bankruptcy Code. There are other provisions that make it clear that assumption and assignment of executory contracts is to be cured, is to be encouraged, for instance, anti-assignment clauses; *ip so facto* clauses. These are unenforceable defaults. I agree with Mr. Kessler if we had, if people had the ability to assert the Debtor defaulted by failing to do "x" prior to this motion or to the sale date but I don't know what the damages are yet that's a completely different issue from the Debtor may have defaulted under the loan at some time. I

don't know what that is. I don't know if it has occurred, and I don't know what damages would even arise if it had occurred, and if I find out about it that somehow they have to cure that. That is simply too vague, too inchoate for the Court to give it any credence in connection with the assumption and assignment of the executory contract and unexpired leases. It is certainly true that in virtually everyone of these cases I deal with and dealt with previously before I took the Bench, that the cure issues don't get decided at the sale hearing. There is an agreement. There's a bid. There's an ask. And the monies made sure that it's there and it's dealt with at a later date. That's what's provided here. But it also provides that if you assert a cure amount prior to assuming, assumption and assignment, that's it. No more cure amount. No more admin claim. I think that's appropriate. I think that's appropriate. So I'm going to overrule those objections on that basis.

Mr. Kessler, anything further? Let's take a break actually. We've been going for about two and a half hours. I'll take a short recess.

MR. KESSLER: Thank you.

(recess 3:15 to 3:32)

THE CLERK: All rise.

THE COURT: All right, break it up. Please be seated. I think we've probably dealt with the bulk at this

point of the objections - -

MR. KESSLER: Yes, Your Honor, during the break we tried to go through the chart and figure out which ones have now been addressed by Your Honor's rulings. And so, Your Honor, I got off script because some of the people got ahead of us in terms of arguing their objections and doing the testimony earlier. And so if I can, I'd like to go back and mention something that I should have mentioned earlier and be fully candid with the Court as I always am. After the mailing deadline, the Debtors updated the cure schedule after learning of some contracts that were inadvertently left off of the original schedule. And we had left off two leases approximately 340 subservicing agreements which seems like an awful lot amount, awful large number but it actually is not in relation to the total number in this case. And, three, pipeline transactions: these are transactions in which the Debtor did not originally have an obligation because they were just loans in process. But once they became originated loans they would be actual contracts that we would like to assume and assign. We sent out through Epic on November 13th a late notice to assume and assign those contracts, the contracts I've mentioned. And I'm sorry, we sent that out on November 20th. And in order to provide each of those parties with the same period of time to object, we have extended the notice period for those parties to December, to the December

10th hearing. So we may hear at December 10th some additional objections that are related just to those late notice contracts.

THE COURT: All right. Okay.

MR. KESSLER: And I'm hopeful that we'll clear out today all of the objections for all contracts other than those late notices. So before the break and before we jumped ahead of ourselves, I think we were at number 7 the Wells Fargo objection which I believe by Your Honor's ruling has been overruled. I think the U.S. Bank objection number 8 falls in the same category.

THE COURT: I agree.

MR. KESSLER: I think we're now down to number 9 the GMA LLC objection. This was a limited objection where we've now been informed that this objection's been, says been withdrawn, excuse me. And I believe that their counsel announced that right at the end.

THE COURT: Yes.

MR. KESSLER: Number 10 falls within Your Honor's ruling on cure amounts so that one should have been disposed with. Similarly, number 11 which is the Genworth North American one.

THE COURT: East, 12 East Bank that's a bit different.

MR. KESSLER: Yes. In this one they were asking for some assurance as to whether their loan was being transferred or just the servicing of their loan. And we have resolved that we would make a statement on the record to confirm that the transfer to Berkadia will not change ownership of the loan. It is just the servicing of the loan that will be transferred and; therefore, the request to assume and assign servicing related to their contract does not address the issues that concern them.

THE COURT: All right, Mr. Simon?

MR. KESSLER: I'm sorry?

THE COURT: Mr. Simon.

MR. KESSLER: Oh, I'm sorry.

MR. SIMON: Thank you, Your Honor, Chris Simon on behalf of East Bank. With me in the Courtroom is Paul Wolfson of Wilmer Hale and the Debtors' counsel representations are accurate and that does resolve our objection.

THE COURT: All right.

MR. SIMON: And I appreciate the Court's time.

THE COURT: You bet. Thank you.

MR. WOLFSON: Thank you, Your Honor.

THE COURT: You're welcome.

MR. KESSLER: Number 13 the Freddie Mac objection has been withdrawn subject to the sale going to Berkadia.

Number 14 the Bank of America objection, I believe, is overruled per Your Honor's rulings prior to the break. Same with number 15 Wells Fargo and Wachovia Bank. Number 16 the R.R. Donnelley global real estate servicer. They claim that there are some invoices for prepetition services totaling $219,909.00 that are outstanding and; therefore, are in default. We will, we will escrow that amount. The amount claimed is under review and if we can reach agreement, we will.

THE COURT: Okay.

MR. KESSLER: If not, we'll be back before Your Honor. Number 17 Deutsche Bank's objection, I believe, is overruled.

THE COURT: Sorry, Ms. Miller.

MR. KESSLER: Oh I'm sorry.

MS. MILLER: Sorry.

MR. KESSLER: Someone has to bang me.

MS. MILLER: Good afternoon, Your Honor, Kathy Miller on behalf of R.R. Donnelley. We did submit a cure objection for the approximately $219,000.00 on a prepetition claim. The Debtor, I'm sorry, R.R. Donnelley has been providing services to the Debtor post petition. And they had been submitting invoices and there's a process where we submit invoices. We review them and they keep in contact with us about when we expect payment on that. So there is

another period opine for which is not governed or covered by the $219 that we want to get confirmation that they will continue to be processed in the ordinary course. It looks like, if I have my numbers right, about another $80,000.00 for the post petition. And as Mr. Kessler just said that they believe that the, it will be a couple more weeks before we close. So there may be another little bit of a gap period. So I just want to make sure that we're covered.

THE COURT: All right, Mr. Kessler, I assume that's all right?

MR. KESSLER: Yes, sir.

THE COURT: Okay. Thank you, Ms. Miller.

MR. KESSLER: If I can go back for a moment to Bank of America number 14.

THE COURT: Okay.

MR. KESSLER: There is an amount that, they did declare one amount in dispute of $3.8 million dollars. And so - -

THE COURT: That's the, that's the $130,000.00 a month that wasn't paid? Mr. Harbour's nodding yes. Okay.

MR. KESSLER: Okay.

MR. JONES: Your Honor, this is Bob Jones, good afternoon from Patton Boggs, and I represent the certificate holders on that particular [indiscernible] and servicing agreement. And this is a, was a mistake made by Capmark with

regard to one of the underlying loans. It was, it was entered incorrectly and led to a failure to fund a required rollover account for a period of about two and a half years.

THE COURT: All right.

MR. KESSLER: We will escrow that amount, Your Honor. The remainder of that objection should be overruled.

THE COURT: Okay, I agree.

MR. KESSLER: Number 17 Deutsche Bank I think falls under the earlier rulings and should be overruled. There is number 18 ACAS,CRECDO 2007-1 limited.

THE COURT: That's the same issue, isn't it?

MR. KESSLER: Yes - -

MR. JONES: Yes, that's our, those are my clients, Your Honor. This is Bob Jones.

THE COURT: All right so only $3.8 million will get escrowed not $7.6.

MR. KESSLER: Correct. It's the same objection by two related parties.

THE COURT: Got it.

MR. KESSLER: So number 19 is a reservation of rights filed by the Official Committee of Unsecured Creditors. I don't believe that that reservation of rights has any applicability any longer, but I - -

THE COURT: I think they're on board. I think they said that.

MR. KESSLER: Yup.

THE COURT: They're all on their Blackberries so we'll just assume that that's correct.

MR. KESSLER: Number 20 the Inverness Properties LLC as landlord under two lease agreements, objection says they have an $8,897.00 cure amount outstanding. This was, this represents a check that was sent to them prepetition but was not cashed prior to the filing. So we will get with them and resolve that amount.

THE COURT: All right I see two notes here $8800 and about $10,000.00.

MR. KESSLER: And there's another $10,553.00 amount and, there again, we will escrow those amounts and either reach agreement or be back before Your Honor.

THE COURT: All right.

MR. KESSLER: The General Electric - -

THE COURT: Mr. Harbour.

MR. KESSLER: Sorry.

MR. HARBOUR: For the record again, Jason Harbour, Your Honor. And just a point of clarification, our objection was overruled with respect to the unknown breach issue, but we also, like most of the Trustees, raised expense claim concerns and cure claims. My understanding was that that part of the objection we would be providing like the other Trustees estimates to the Debtors. Those amounts would be

cured and they would be either agreed upon or brought before Your Honor.

THE COURT: All right.

MR. KESSLER: I thought that we, that Your Honor's ruling was that they would have to submit some kind of an invoice amount.

THE COURT: Absolutely, prior to closing.

MR. KESSLER: Yeah okay.

THE COURT: With back up.

MR. KESSLER: I think we're down to number 21 General Electric Capital Corporation which I believe is overruled by Your Honor's earlier rulings.

MR. BENEDICT: If it please the Court, Your Honor, Mark Benedict with GE Capital.

THE COURT: Yes.

MR. BENEDICT: We had raised two issues. The first issue was the cure issue which has been overruled though and so I won't go into that. The other that we identified is, I think Your Honor has also made statements that largely resolve that. There's an extrinsic event that's occurred under our servicing agreements that gave rise to a termination event, not a default by the Debtor. And so our position is that if Berkadia takes it, it takes it subject to those rights whatever they are including our right to

terminate even if Berkadia takes it, even if it wasn't a default by the Debtor to cure.

THE COURT: That's the default by the filing of the *GM* case?

MR. BENEDICT: Yes, Your Honor.

MR. KESSLER: And they have a motion to lift stay and we will address that issue at the lift stay hearing. But I don't believe that it stands in the way of the Berkadia sale whichever way Your Honor rules.

THE COURT: All right.

MR. KESSLER: It may end up in an adjustment but not; it won't stand in the way of the sale.

MR. BENEDICT: Yeah we don't believe it stands in the way of the sale nor do we believe that it stands in the way of the assumption of the contract. We're just putting people on notice. We believe that right out there exists.

THE COURT: Well if you have the right to terminate, you have a right to terminate.

MR. BENEDICT: Thank you.

THE COURT: You're welcome.

MR. KESSLER: I'm advised, Your Honor, that the Inverness Properties $18,000.00 amount, it's actually closer to $19,000.00; that we agree to those amounts and so they were beyond the point of putting it in escrow and discussing it.

THE COURT: So you're going to pay it?

MR. KESSLER: Pay that cure amount.

THE COURT: I think counsels on the phone, is that all right? No?

MR. KESSLER: If he objects, I'll consent to the objection.

THE COURT: All right. I'll take care of; I think that's it, right? Oh, excuse me.

MR. KESSLER: Number 23 - -

THE COURT: Mr. Kessler, sorry.

MS. MCCONNELL: Good afternoon, Your Honor, Lauren McConnell on behalf of Inverness Properties. Mr. Kessler is correct. The exact amounts of the cure objection was $19,431.54. And an agreement was reached shortly before the hearing that that amount would be agreed to by the Debtors would be paid.

THE COURT: Okay.

MS. MCCONNELL: Thank you.

THE COURT: You're welcome. I think that's it for the objections.

MR. KESSLER: There's one more, Your Honor, U.S. Bankcorp Community Development Corporation and U.S. Bankcorp Community Investment Corporation, number 22. And this was a late filed objection but, nonetheless, these agreements that are addressed in that objection were inadvertently included

in the, on the cure schedule but are excluded assets in the contract and will not be assumed and assigned.

THE COURT: Okay.

MR. KESSLER: And we've agreed with counsel that we would make that statement on the record.

THE COURT: Okay.

MR. KESSLER: And so that should deal with the cure schedule. I understand Mr. McMahon has an issue with respect to the order that he wants to address.

THE COURT: All right, subject to, oh I'm sorry. Is this an issue with the order language?

MR. MCMAHON: Well I'd call it general sale issue if you want to, Your Honor, wants to address the cure as first then I'll just sit down.

THE COURT: No, no because I'm going to approve the sale subject to the order assuming I don't sustain your objection.

MR. MCMAHON: Understood, Your Honor. Well Joseph McMahon for the United States Trustee. Your Honor, prior to today we raised informally with the Debtors whom I understand they raised with the purchaser the following issue. A part of the deal here involves say the upstreaming of assets from Capmark Bank certain loans and advances, and they're being transferred to the Debtor. Then they're skipping through as part of the sale an issue we raised into whether or not

they're a free and clear sale with respect to that, those assets, what it means and the context of its construct. Capmark Bank is a non-debtor. We're all familiar with the law with respect to free and clear sales. I mean obviously you wouldn't be able to do that with respect to non-debtor assets. But given the fact that the only sensible reason that we could, I guess, come up with for doing it this way would be to try to somehow use the powers of 363 to bring the bear upon this aspect of the transaction. It's an issue for us since so far as what exactly is going on here on a mechanical level. Certainly, given that we're dealing with non-debtor assets, I think we need some clarification from the Debtors as to what the status of claims vis-a-vie those non-debtor assets are post this transaction.

THE COURT: Okay.

MR. KESSLER: A couple of points, Your Honor, first the contract for purchase is for purchase of these assets from the Debtors. Capmark Bank is not a contracting party with Berkadia. And this contract entered into prepetition provides that CFI, Capmark Financing, and the other sellers are obligated to sell the servicing advances and loan originations that currently reside in Capmark Bank. They were conveyed there as a capital contribution sometime ago. We'll come back to CFI so that they can be sold to Berkadia pursuant to the contract. I'm advised by counsel at Capmark

that Capmark, CFI, always retained a repurchase right against the servicing advances and loan originations that they could always bring them back for cash if there was a desire or need to do so.

Lastly, these are unencumbered assets as we, as we presented in the motion and have argued that there is no known lien or encumbrance against any of the assets being sold to Berkadia that could give rise to any significant issue under 363(f). And so we don't see why we should not be able to give the full 363(f) protections to Berkadia as we are contractually committed to do under the APA agreement, notwithstanding that some of the assets we're selling are going to come back into the Debtors for a short period of time in order to close the transaction as it was documented. And I believe that Mr. Califano on behalf of Berkadia would like to also address the Court on this issue.

THE COURT: Okay. Mr. Califano.

MR. CALIFANO: Yes, Your Honor, thank you, Your Honor. Your Honor, we're purchasing the assets, excuse me, we're purchasing the assets from the Debtor. We have bargained for a free and clear finding from this Court and to purchase these assets free and clear. The transactions by which the Debtor may take these assets into the estate between affiliated Debtors should not be our concern. This contract, this sale has been noticed to the world and the

structure has been noticed to the world. And the only issue we're getting is from the Office of the United States Trustee. If there is something wrong, which I'm not implying, if there is something that it was created by the way these assets were brought back into the estate, it should not be our issue. We're buying from a Debtor. We should buy free and clear.

THE COURT: Mr. Kessler, is the bank represented by independent counsel?

MR. KESSLER: They are represented by independent counsel. Well they're not represented by my law firm, put it that way, and I do not believe that they are here today.

THE COURT: All right. And they obviously had notice of the fact that $500 grand was going out the door? It's about $500,000.00, is that right?

MR. KESSLER: $500 million.

THE COURT: $500 million uh oh.

MR. KESSLER: They're not selling for $500,000.00 - -

THE COURT: I'm not thinking, you know, I'm not thinking big enough numbers. Mr. McMahon, any response?

MR. KESSLER: Mr. [indiscernible] makes the point that all assets reside at someplace at some point in time. We're always talking about timing here.

THE COURT: Well, you know, there could be a concern

that well, that it's [indiscernible] conveyance or breach of fiduciary duty or something in connection with the bank. I'm not saying there is, but, Mr. McMahon.

MR. MCMAHON: One reply with respect to the re-purchase right. A point of inquiry to the Debtors is whether all the funds on account of these assets are immediately being down streamed to the bank.

THE COURT: Well they're being upstreamed and then - -

MR. MCMAHON: Well I know, but the proceeds I guess what's - -

THE COURT: I assume the proceeds aren't going to the bank?

MR. KESSLER: Yes, Your Honor, the bank is getting the proceeds for its assets.

THE COURT: Oh I see, okay.

MR. MCMAHON: And the second point, Your Honor, is well I don't think that the free and clear protection this Court could extend could in any way apply to claims vis-a-vie the bank anyway. So the extent that the sale order could be clarified to make that clear I think I might - -

THE COURT: Well I don't think that's necessary. It is what it is. Look, I couldn't give a free and clear finding or order in connection with a non-debtor. I just couldn't do it. So if there's some sort of conversion claim

that would ultimately allow the bank to go against whoever has their assets, well no but that would be - - never mind that would be scrubbed by this order, I assume.

MR. KESSLER: The issue is whether a party can go against Berkadia for a matter that - -

THE COURT: It's really internal.

MR. KESSLER: That is internal or relates to a creditor - -

THE COURT: Yeah, no I'm comfortable with that. I'm not bothered by that. I'll approve it like that.

MR. KESSLER: Okay. So, Your Honor, I think we're now at the end of the motion, at least as far as dealing with the evidence and the objections. And if I can, I'll give a summation argument as to why we believe that the Court should approve to Berkadia including the assumptions signed by contracts and the protections of the order that give, that are given to Berkadia.

THE COURT: Well let me, I think Committee counsel looked like he wanted to be heard.

MR MAYER: Your Honor, I decided the clarification I wanted to make is not necessary.

THE COURT: Right. I don't need a summation. I think it's clear based on the evidence before the Court that the standards under 363 and 365 in connection with the sale of these assets including the assumption and assignment of

unexpired leases and executory contracts are clearly met; that the buyer has provided adequate assurance of future performance; that defaults will be cured pursuant to the procedures set forth. The Debtor is going to appropriately escrow the full amount of liquidated cure claims for disposition at a later date. The buyer as I said earlier, the buyers clearly acted in good faith and at arm's length. So I also think this a terrific result from a, just a substantive standpoint. Employees are going to keep their job. The business is going to stay in place and the assets will continue to be serviced and the mortgages will continue to be serviced. So subject to actually looking at the order, I will approve this sale.

MR. KESSLER: Thank you, Your Honor. And I am ready to hand up the order. There were no objections to the language other than the one raised by Mr. McMahon. I do have a black line that shows changes that were made from the form that was attached to the original motion.

THE COURT: Okay.

MR. KESSLER: And I've put a yellow tab on one page that requires a date be inserted.

THE COURT: All right.

MR. KESSLER: Thank you, Your Honor, may I approach?

THE COURT: Yes. Thank you. Just let me look through the black line real quick.

MR. KESSLER: Your Honor, it's been brought to my attention that there's language in the order that says cure amounts have been approved to the amounts stated on the record, and I would consent and concede here on the record that to the extent otherwise clarified or determined during the hearing today.

THE COURT: Very good. What date do we need?

MR. KESSLER: It's today's date; date of entry of the order.

THE COURT: It's already in there. It's in there where you tabbed it.

MR. KESSLER: It is?

THE COURT: Looked like it; second line?

MR. KESSLER: It has the word date on the first line.

THE COURT: Oh, oh.

MR. KESSLER: It's their - -

THE COURT: I, I didn't see it. I apologize. All right, I am signing the order. All right, what's next?

MR. CALIFANO: Your Honor, may I be excused?

THE COURT: Yes, you may.

MR. KESSLER: Your Honor, if I may proceed?

THE COURT: Yes.

MR. KESSLER: The next item on the agenda, the next item I'd like to address is item 8 on your agenda and that's

the final hearing on the wages and benefits motion. This is a matter of paramount importance to the Debtors and the continued vitality of their business operations. On the commencement date, the Debtors filed a wages motion. And following the first day hearing, the Court entered an interim order authorizing the Debtors to pay up to $6.9 million dollars in employee obligations subject to the statutory $10,950.00 priority cap. In the order, the interim order the Court also authorized the Debtor to continue to honor their existing employee obligations that existed as of the commencement date. But the now, we now seek continuation of these employee obligations on a permanent and final basis and ask that the Court grant such relief. There has been no objection to that part of the motion which is - -

THE COURT: Issues is the commissions, right?

MR. KESSLER: We're coming separately to those matters. We're also asking the Court to consider approval of certain prepetition payments that were carved out of the interim order and are under the Debtors various employment plans. Specifically, the Debtors reserved in the wages motion the right to seek approval of continued payments under their prepetition employee compensation plans. These include the prepetition commission plan, the 2008 and 2009 bonus plans, and the deferred awards program and severance plan. And if I can, I'd like to discuss each of these separately.

It's out feeling that the continuation of these plans is an absolute integral and necessary part of the ongoing stability of the company. We filed a supplemental brief last Friday on November 20th to explain why we believe the Doctrine of Necessity should in this instance allow the prepayment or, excuse me, the payment of the prepetition amounts that will come due under these plans during the course of these cases and is discussed at length in our supplemental brief. The Debtors believe that the approval of these plans is necessary and essential to maintain the stability of the company going forward. Now I can personally attest to the fact that the thread of employees leaving the company and leaving the company in dire straits is real. I was contacted by an attorney representing a large number of employees and I believe now larger than he represented at the time. And he stated to me that on behalf of his Ad Hoc group of employees that if we don't get them relief under their compensation plans - -

UNIDENTIFIED: Objection.

MR. KESSLER: - - that they're threatening to walk out the door.

THE COURT: Yeah this is hearsay. And - -

MR. KESSLER: I'll be glad to testify to it if its, if necessary. Your Honor - -

THE COURT: It would still be hearsay.

MR. KESSLER: Well maybe he's here.

THE COURT: Maybe he is. But, I understand, the Debtor has a belief that it will lose people, right?

MR. KESSLER: Your Honor - -

THE COURT: The Debtor has a belief that it will lose people, correct?

MR. KESSLER: Correct.

THE COURT: All right.

MR. KESSLER: I've also prepared to offer Mr. Jay Levine as the chief executive officer of the company to provide testimony on the, on this issue. And after my presentation, if I can, I'd like to put him on.

Your Honor, on pages 4 through 6 of our brief, we discuss and argue the necessity of the payment doctrine and why we believe that it applies here. I don't want to repeat everything that is in our brief. But suffice it to say that if the necessity of payment doctrine lives, and we know that it lives especially in the 3rd Circuit and in this Court, to pay critical vendors who are threatening to not supply a debtor with supplies unless their prepetition claims have been paid. To pay prepetition insurance payments, to pay other types of prepetition claims where a showing is made that the actual cost to the estate of paying these prepetition claims out of place will actually, of not paying the claims I should say, will actually be much more severe

and much greater harm to the estate than would result from paying the prepetition claims. The necessity of payment doctrine would allow for the payment of those claims. And we would submit that if that doctrine, that under that doctrine who could be more significant and important for payment under the necessity of payment doctrine then the employees who are the first line of defense. The first and foremost group that needs to be protected against in a, as a necessity for protecting the estate where those employees are actually and in real terms threatening to leave; threatening to leave the company in a way that would severely harm the company in amounts much, much in excess of what it would cost to pay them. There's no reason to pay critical vendors. There's no reason to pay any other prepetition claims if the employees are going to walk out. There's no one in the store to sell the goods that the critical vendors would supply. There's no asset. The asset values would diminish dramatically where we would question making payment for other claims if the employees are going to walk out on you. So it's our argument that the necessity of payment doctrine must apply equally or, even more so, the employee prepetition claim then it does to any other group of prepetition claims that the Court's frequently allow to be paid.

Now why is it so necessary in this case to pay these employees. First, the Court has now entered an order

authorizing the sale of the servicing business to Berkadia. Under our contract, Berkadia is going to take the employees along with the business. We can't deliver the business without the employees. The employees run this business. These are not assets that have value on a stand alone basis. And if the employees are not paid and threaten to walk off the job, we are in a situation where it may be very difficult to us to realize full value from our contract the amounts many, many, many millions of dollars far in excess of what we're proposing to pay these employees. Second, I'm going to, as I get into the numbers, hand up to Your Honor a chart where we have put in place the amounts that we are asking to pay under each of these plans to the employees and the amounts that we have estimated will be assumed by Berkadia when these employees go over to Berkadia. And this is because we would, assuming the sale closes with Berkadia, we would only be paying these prepetition claims in the ordinary course of business up through the time of the sale. And Berkadia would pick up and pay all of the claims that come due under those employee compensation programs on a going forward basis. Now it is true that the contract has an adjustment to the purchase price for the costs of these claims that Berkadia will assume. And so they get a purchase price reduction of 57% of the cost, but they're going to pay the claims from and after the closing. So the cost to the

Debtor assuming the closing is far less than the actual total cost to the plan if there is no closing.

Now prior to today's hearing, we had extensive discussion with the Creditors Committee and its advisors about these plans in an effort to reach agreement, in an effort to reach agreement on or support, I should say, from the Committee to go forward. And I'm pleased to say that with the adjustments that I will bring to the Court's attention, the Committee has given its full support for these plans and for the payment of the plans in the order that I will, that I will describe to the Court as we go through it.

May I hand up a chart so it makes it easier for Your Honor to follow as I go through it?

THE COURT: Yes. Mr. McMahon, you look like - -

MR. MCMAHON: At the close of his presentation.

THE COURT: Okay.

MR. KESSLER: So, Your Honor, the demonstrative exhibit that I've handed to you shows the dollar amounts that we're asking the Court to approve today, assuming a sale to Berkadia, and that what it would cost the estate if approved and there was no sale to Berkadia.

The first category on the chart is the commissions. With our agreement, the agreement that we reached with the Committee to support these payments provides that the prepetition commissions that were earned as part of the

normal compensation by loan originators upon can be paid upon Court approval for those commissions that have, that were earned prior to the commencement date provided; however, that any individual in the group who would be paid a commission, a past due commission, in excess of a $150,000.00 would wait for the excess over the $150,000.00 until the closing of the servicing sale to Berkadia. As a result of that agreement with the Committee, the cost of the prepetition commission program would be $1,023,299.00 upon Court approval. And there would be an additional $391,244.00 which is the excess amounts to employees who would get commissions over a $150,000.00 that would be deferred until closing of a servicing sale. And those two numbers would apply whether we sell to Berkadia or sell to any other party assuming that Berkadia - - when we did this chart, we didn't know whether the Berkadia sale would be approved today so I'll say today that if the Berkadia sale doesn't close for any reason and we sell to someone else.

The second category of claims that we're asking to pay are the 2008 and 2009 bonus plan payments that remained that were earned prepetition and remained unpaid as of the commencement date. And Your Honor can see that there is one million, assuming a sale to Berkadia, we're asking the Court to approve $1,273,000.00 that would be paid on 12/31/2009 and $763,000.00 would be paid to North American Servicing and

Mortgage banking employees that are being, that would be assumed by Berkadia, and another $1,387,000.00 that is payable on March 31st of 2010. Of that amount $1,313,000.00 payable to the servicing and mortgage banking employees will be assumed by Berkadia and the Debtor would only have to pay the difference. Now these numbers are assuming that the sale takes place on December 31st of 2009. In the event the Berkadia closing is on or after the payment date for the 2008 and 2009 bonus plans and the Debtors have an obligation, would have an obligation to make the December 31 payments before the closing. Right now, the Berkadia sale has a deadline for closing of December 31st so I don't think the footnote should be relevant on a Berkadia sale. If there is no sale to Berkadia, the 2008/2009 bonus plans would cost the Debtors $2,036.00 on 12/31/2009 and there'd be no assumption by Berkadia and $2,700,000.00 - - I think I misstated the first one; $2,036,000.00 on 12/31/09 and another $2,700,000.00 on 3/31/10; again no assumption by Berkadia under that example. And lastly, we have the deferred awards that are payable at some point in the future. If we have a Berkadia sale there would be no amount paid by the Debtor. And upon closing of the sale to Berkadia, they would assume the full $9,800,000.00 due under this program. If there is no sale to Berkadia, the Debtor would be obligated to pay the $9,800,000.00. And the agreement with the Committee would

alter the payment schedule on this amount to make 50% payable one month after the closing of an alternative servicing sale and 50% payable one year after closing of the alternative servicing sale. And the full amount would be payable upon any employee being terminated without cause. He would still retain his deferred award.

Your Honor, we also have an agreement with the Creditors Committee with respect to the severance plan; however, that agreement is that the severance plan will be honored and respected by the Committee, but we will continue to work with the Committee to try to fold in the severance plan, the prepetition earned severance with a post petition performance bonus plan; retention bonus plan for the applicable individuals so that we can have one type of retention and bonus plan that incorporates severance, prepetition severance earned with it. So we have no numbers for that today. We just have an agreement to keep those severance plans in mind as we continue to negotiate.

I want to emphasize again that we are not asking today for the payment of any of the 2008/2009 bonus plans to insiders. This is only to non-insiders nor are we asking to pay insiders on the deferred awards. We are asking the Court today to bifurcate the hearing and simply asking for approval of the payment of the amounts that are on your chart and leave until December 10th when we will put on additional, we

will put on evidence at that time on the issues of insiders vs. non-insider and try to meet the standards that Your Honor has set forth in detail in the *Foothills* Texas case. The amounts here are what we believe should be payable to the people we believe to be non-insiders. To the extent on December 10th it's determined by the Court that certain individuals on our non-insider list should really be insiders, than these amounts would go down accordingly. But all we're asking for today is to approve the plans leading over so that we can tell the employees that they've been approved and, and get those issues out of the way and leave until later the issue of who is an insider, who is not. The reason we're leaving until December 10th the issue of who is and who is not an insider is to give the Committee and the United States Trustee's office additional time to review the tables that we will present of the names of the individuals, the types of bonuses, and deferred awards they're entitled to and what their positions are and what not so they can be better prepared to either confer with us and/or cross examine at the hearing.

Now I'm prepared to put Mr. Jay Levine the CEO of the company on the witness stand and, and get his testimony with respect to the fact situation of the company that we believe would meet the necessity of payment doctrine for these commissions.

THE COURT: All right, let's hear from Mr. McMahon.

MR. MCMAHON: Your Honor, good afternoon, Joseph McMahon for United States Trustee. We ask that the entire hearing on this motion be moved to December 10th and here's why. In connection with evaluating the relief that was sought by the motion, the Debtors have indicated that in their brief and, I guess, to our office that they have, are working on identifying this insider, non-insider split. They have indicated what factors they're taking into account in making that determination. But as late as, we made the request, I believe, last Thursday. We spoke with them again on Sunday requesting the list of employees that are thought to be paid pursuant to this motion. And as Debtors' counsel indicated on the record today, we still do not have a defined universe from the Debtors' perspective as to what constitutes an insider or not.

THE COURT: I thought I heard no monies going out the door until I make that determination under the bonus plan category.

MR. KESSLER: Yes, the commissions would go out the door, the two bonus plans, deferred awards, and 2008/2009 bonus plans would not go out the door - -

THE COURT: And any insider, this is the maximum amount that will get paid. And as people are determined if

they are to be insiders, they won't get paid. And that the aggregate number will go down?

MR. KESSLER: Correct.

THE COURT: I just wanted to clarify. I'm sorry, Mr. McMahon.

MR. MCMAHON: From our perspective, Your Honor, splitting up the hearing on who gets paid from the need for payment is cumbersome; certainly, not preferable from our office's perspective. And it just, you know, some of the issues dealing with necessity certainly get involved in the granular facts as to who you're trying to pay or not. And I appreciate the fact that the Court has indicated or no payments can be made until we get to the bottom of the insider, non-insider issue. Well we don't even have base level data as to who is getting paid on the non-insider side of matters such that we can take a look at it. So in light of the circumstances, while I appreciate the fact that the company's want some level of resolution on this issue sooner rather than later, it makes sense from our office's perspective to put it over to the 10th in its entirety. To the extent that the Court wants to deal with the commission issue today alone that's the, you know, little bit or approximately $1.4 million dollars, we're prepared to do that. But the balance of the relief, Your Honor, that should be pushed off to the 10th.

THE COURT: All right, thank you. Ms. Caton.

MS. CATON: Thank you, Your Honor, Amy Caton from Kramer Levin. First of all, I'd like to apologize for my inattention earlier. I was trying to send an update to our Committee and I'll find a more appropriate way to do that the next time.

THE COURT: No, no, that's fine.

MS. CATON: First of all, Your Honor, we had originally sought to postpone this motion until the 10th as well. We were uncomfortable with some of the Debtors' numbers and we didn't feel like we had adequate time to review the information; however, our advisors [indiscernible] worked for several days with the Debtors to go through these numbers on an employee by employee basis. And we've come to the conclusion that the numbers are reasonable. They're for prepetition amounts. And as the Debtor said, we expect that the numbers, particularly with respect to severance, are going to be taken into account with respect to any future retention plans that are proposed. While we understand the U.S. Trustee's frustration given that these amounts appear to be reasonable and necessary, we really would prefer to have this heard today so that we could get our maximum benefit of stabilizing the estate today and keep people from leaving. And I'd also just once again note that these are prepetition amounts due. They're not amounts due under 503 or seeking,

the Debtors are not seeking approval of a 503(c) plan. And I don't think that the, while they offer to distinguish between insider and non-insiders, I'm not sure that it's necessary here.

THE COURT: While I, that last argument I don't think holds water.

MS. CATON: Fair enough. Thank you, Your Honor.

MR. MAYER: Point of inquiry, Your Honor. The Committee indicated they had employee level detail. If they did, I'm wondering why our office didn't have that in hand earlier.

MR. KESSLER: I believe if I'm correct that your office has the full list of employees who are receiving, to receive the commission payments, is that correct?

THE COURT: Did you have this conversation offline?

MR. KESSLER: The - -

THE COURT: Just figure it out over there and then you can talk to me about. Just step aside, figure out what he has, what he doesn't have, and then let me know if there's still a problem.

MR. KESSLER: The reason they don't have the names of the people, Your Honor, is because we've been endeavoring to go through a very rigid exercise with the client with analyzing the job functions of each of the people against Your Honor's *Foothills* Texas case. This is a company that

has many people who have officer positions which is very common in the industry. But we will endeavor to show that many of those people, most of those people are not insiders based on the job function they have and utilizing Your Honor's decision that allows the presumption to be overcome with evidence. And we're going through that analysis first within the company, then company to lawyers, and changing it on a regular basis. And we're agreeable to deferring that analysis to December 10th but as you heard from me and from Ms. Caton, we feel there's a huge need for laying the fears of the employees to let them know that we're going to, that we have the ability to pay them if they're not an insider.

THE COURT: I agree. I'm going to deny the motion and continue. And I'll hear the first phase which is in connection with the bonuses which is the amount and the necessity of the program. And I'll hear the commission's motion and we'll wait until December 10th to deal with who actually gets money and who doesn't.

MR. KESSLER: So may I - -

THE COURT: And I just want to comment. I understand the Committee's position but it would be my position that even though these are payments that were earned prepetition under a prepetition bonus plan that, nonetheless, seeking to pay them post petition and, in effect, give them administrative claim status implicates 503(c).

MR. KESSLER: Okay, Your Honor. May I call Mr. Levine to the witness stand?

THE COURT: Yes.

JAY LEVINE, DEBTOR'S WITNESS, SWORN

THE CLERK: Please state your full name for the record.

MR. LEVINE: Jay Levine, J-a-y, L-e-v-i-n-e.

DIRECT EXAMINATION

BY MR. KESSLER:

Q. Mr. Levine, you're employed by Capmark Financial Group, Inc., is that correct?

A. That is correct.

Q. And what is your title?

A. President and CEO.

Q. And how long have you held this position?

A. Since the beginning of this year.

Q. And as President and CEO of Capmark Financial Group, Inc. or what we refer to frequently as CFGI, are you familiar with the company's commission program?

A. Yes, I am.

Q. Are you familiar with the 2008/2009 bonus plan?

A. Yes, I am.

Q. And are you familiar with the deferred awards program?

A. Yes, I am.

Q. And are you also familiar with the severance program?

A. Yes, I am.
Q. And in connection with your job as CEO of the company, have you had discussion with employees since the filing of this bankruptcy case concerning the payment of the commissions, the bonuses, and deferred awards with various groups of employees?
A. At length.
Q. And can you briefly describe for the Court the discussions that you had with the employees?
A. Sure. In a nutshell with respect to the commissioned employees, they've been highly concerned as a result of the postponement and the first day hearing of whether or not commissions would be affirmed going forward. We let them know that it was to be dealt with today. And they should remain comfortable and continue to do business, closed business on behalf of customers and the company.
MR. MAYER: Objection; hearsay.
MR. KESSLER: Your Honor, I don't believe it's hearsay for him to testify about what he knows or I'll change the question to overcome the hearsay if you like?
THE COURT: Well to the extent he's telling you what employees told him, yes its hearsay. But to the extent he has an opinion as a fact witness based on what people have told him on what effects may or may not occur in connection with having the program, I think he can testify to that.

MR. KESSLER: And thank you, Your Honor, I was going to correct my question.

BY MR. KESSLER:

Q. Based on information that you have in conversations with employees or otherwise, do you have an understanding or an opinion of the employees' position with respect to the non-payment to date of their commissions?

A. Yes, I do have an opinion.

Q. Explain your opinion or understanding.

A. My opinion is at this point employees are quite upset and uncertain as to what the program will be put in place. My knowledge is its highly unusual for a company like ours to be in bankruptcy and still be able to conduct business the way we have. And employees want certainty as I think most would that the business they bring in will produce the income they've gotten in the past.

Q. And based on the discussions that you've had with employees, do you have an opinion or understanding as to whether they will or would threaten to leave the employ of Capmark if their commission payments are not approved for payment by the Court?

A. I do have the belief that many of them would be ready to leave if their payments, both prospective and retrospective weren't made.

Q. And do you have any information other than the fact of your discussions with the employees about the possibility of that?
A. We've received information from competitors who we know have been speaking with many of our important producers. Matter of fact, we've received a letter from someone who has expressed that clients have or - -
THE COURT: Sustained; that's hearsay.
BY MR. KESSLER:
Q. Do you have a copy of that letter with you?
A. Yes, I do.
Q. Do you have it in front of you?
A. Yes, I do.
THE COURT: It's hearsay. What are you doing?
MR. KESSLER: Can I ask him some questions?
THE COURT: All right; yes you may.
BY MR. KESSLER:
Q. Who was the letter received from?
A. The letter was received from Love Funding.
Q. And can you briefly describe what Love Funding has said in the letter?
A. Love Funding is a large FHA loan originator who had, it was aware that PNC was potentially acquiring part of the business, didn't necessarily want all the people and expressed an interest in that division of the company. And,

in particular, went out of their way to say that many of the employees had already contacted them in advance.

THE COURT: Sustained.

BY MR. KESSLER:

Q. Did you believe the letter when you read it?

MR. MAYER: Objection.

A. Yes.

THE COURT: Well he can testify as to whether he believed it, but the substance of it is not in, the substance of it is not in evidence.

MR. KESSLER:

Q. Based on your review of this letter, do you have an opinion as to whether the employees might leave for other opportunities in the origination field?

A. I do believe that many of the employees have been looking and would be interested in leaving.

Q. Are you familiar with the asset purchase agreement for sale, the servicing business to Berkadia?

A. Generally.

Q. Are you aware of any provisions of the contract that provide for Berkadia to assume the employment of employees?

A. Yes.

Q. And what does the agreement provide, to the best of your knowledge?

A. To the best of my knowledge, the agreement provides for

Berkadia to pick up and assume the, all the employees of the mortgage banking and servicing division.
Q. And is it also your understanding that they are purchasing the mortgage banking and servicing business as part of the contract?
A. Yes.
Q. Is, in your opinion can the mortgage servicing and banking business be conveyed without the employees as an ongoing business?
A. It's not really a business without the people.
Q. Mr. Levine, have any other facts come to you that would give rise to an opinion as to whether or not the failure to pay the employees their commissions or other awards here would give rise to their leaving the employ of the company?
A. Well I'm aware of general unease in the company. I am very aware that without some certainty as to the plans that were put in place to actually retain employees through this difficult period that we have been experiencing that many employees will look. We have actually lost a number of key employees of late. I can't say specifically whether it was due to the fact we haven't affirmed these plans, but I am aware there are jobs out there. And we are and many of the key employees that we need for asset management for a transition to Berkadia and to make sure we are able to

effectuate that sale are people that are affected by these plans.

Q. And your testimony has been primarily to this point about the payment of the commissions. Does the testimony that you gave apply equally as well to the authorization to pay the 2008 and 2009 bonuses?

A. Yes, it does.

Q. And does it apply equally as well to the payment of the deferred awards?

A. Yes, it does.

Q. And does it also apply to the company honoring the severance programs?

A. Yes, it does.

Q. Although the severance program payments would not be payable unless the company actually severed the employment of employees, correct?

A. Correct.

Q. Those severance payments would not be payable if the people continued in their employment with the company, correct? And it would not be payable if the employees transferred over to Berkadia?

A. Correct.

Q. Okay.

MR. KESSLER: I don't have any other questions, Your Honor.

THE COURT: Very good. Cross.

CROSS EXAMINATION

BY MR. MMCMAHON:

Q. Sir, good afternoon.

A. Afternoon.

Q. A few questions with respect to what's being put forth before the Bankruptcy Court. First, the deferred awards, what are the criteria for earning those bonuses?

A. Those awards were a part of compensation for business generated in years past that were used to retain key employees and, in particular, key producers from business that was generated in '06, '07, and '08.

Q. And those criteria were established at the beginning of a calendar fiscal year, is that correct?

A. Yes.

Q. Thank you. And under the deferred award's plan, is there an administrator person or a board in charge of administering that program?

A. Linda Pickles our head of HR administers that plan.

Q. Okay. And does that person have any discretionary authority with respect to the targets that were set with respect to those plans?

A. I don't understand the question; I'm sorry.

Q. Sure. You testified that the deferred awards are production type awards. And if I understand your testimony

correctly, the criteria for earning the bonuses are set at the beginning of a fiscal calendar year, correct?
A. I want to make sure we're both talking about the same thing. If you're talking about the deferred award for producers, those specifically were a part of their commissions they generated based on the business they generated in that particular year. And that's different than bonuses. There was a portion of their commissions that were held back that otherwise wouldn't have been paid.
Q. All right, so I'm going by the organization you have in the Debtors' brief so you're seeking payment of prepetition commissions in the approximate amount of $1.4 million dollars, correct?
A. Okay. I think we're talking about different numbers then if we're talking about that.
Q. Okay.
A. If they're part of a prepetition - -
Q. Now - -
A. $1.0 million dollars is a different number.
Q. And your bonus and award's program is something different that has a discretionary aspect and there's the deferred aspect, correct?
A. Those are three different things.
Q. Now the deferred award's program my question is the criteria for earning those bonuses, are they set at the

beginning of a measuring period, a calendar year or fiscal year?

A. Let me just ask one more question, let's go through it. We have the commissions. We have the bonuses. And we have what we call the deferred commissions. Which one are we talking about?

THE COURT: Its deferred awards on your table - -

MR. LEVINE: I don't have the exact schedules - -

THE COURT: And maybe that's, I think what Mr. McMahon is asking is, is there a specific criteria that is established when you start a cycle under the deferred award's program for what someone is going to get or not get? I think you said it's a deferred portion of their commissions?

MR. LEVINE: Let me just make sure I'm clear from Mr. Kessler if I may ask. The deferred awards are the bonus period, are they bonus or they not bonus?

THE COURT: Well if you don't know, you can't ask Mr. Kessler for help. So you don't know.

MR. LEVINE: I just want to be clear which ones we're talking about.

MR. MCMAHON: Your Honor, may I approach the witness?

THE COURT: Yes.

MR. LEVINE: We refer to them - -

BY MR. MCMAHON:

Q. And for the record what I've handed the witness is a copy of the exhibit Mr. Kessler gave to the Court during argument.
A. Now I'm going to deferred awards on the bottom are the portions of commissions from prior years.
Q. Okay.
A. And those are not bonuses. Those are not discretionary. Those were totally related to production earned and business generated in those years.
Q. Okay. And
A. Apologies.
Q. And it's purely a production award based upon criteria that is set temporarily one. Is it set at the beginning of a calendar year or a fiscal year?
A. I'm not sure its criteria as much as it was as portion of the revenue generated by that individual, a portion was held back.
Q. I understand that, but they're getting a cut, right, a percentage of the generation, correct?
A. Right.
Q. Right. And when is that percentage set?
A. It was reviewed annually.
Q. I'm sorry?
A. It was reviewed annually to the best of my knowledge.
Q. Okay. And the employee knew at the beginning of the year what the percentage cut would be?

A. Yes.
Q. And did they have to reach a particular target production-wise in order to earn the bonus?
A. One, I'm not sure of the exact answer, but to earn the bonus they were generally paid commission based on the business they did.
Q. Okay. Well was it zero on up? Meaning if you made $1.00, you got a percentage cut?
A. Yes.
Q. And, therefore, - -
A. Once you covered a minimum level which was generally low, you were paid a percentage of what you generated for the firm.
Q. Over and above the minimum level or just once you, once you reached the minimum level you vested?
A. I think there's two different questions. In general, the earnings came from, they were paid a piece of the revenue generated for the firm. So if an individual generated $500,000.00 of revenue for the firm, if he was for, argument-sake, paid 50% of the revenue generated, he would have been entitled to $250,000.00 for that year of business generated. And then a portion of that would have been held back.
THE COURT: So his commission is $250,000.00 under your hypothetical?
MR. LEVINE: Correct.

THE COURT: And he doesn't get all of that?

MR. LEVINE: Correct.

THE COURT: There's a deferred piece?

MR. LEVINE: Yes.

THE COURT: And that applies to every commission he earns?

MR. LEVINE: Yes.

THE COURT: And do the percentages stay constant throughout or do they rise or fall by level of business? So a guy who brings in a million dollars gets the same percentage commission and the same percentage deferred award as a guy that gets $10 million dollars?

MR. LEVINE: There were various plans for different offices and different individuals.

THE COURT: Based on their business units, etc?

MR. LEVINE: Correct.

THE COURT: All right. Now the part that's deferred the piece of the whole commission that's deferred that's set ahead of time?

MR. LEVINE: Correct.

MR. MCMAHON:

Q. The 2008 and 2009 bonus plans, what are the criteria for those awards? How are they paid?

A. Sure. Let's pick them one at a time. The 2008 bonus, anybody that receives a bonus it's a discretionary bonus set

by their manager. The, usually the person that ultimately that manager reports to all rolled into one program based on performance of the individual, performance of the group, performance of the overall firm and ultimately approved by the, was the former compensation committee of the Capmark Board of Directors.

Q. All right.

A. As part of an overall pool established by the board.

Q. And that is a year end review?

A. Yes, it is. It's generally done in the first quarter after a year completes.

Q. Okay. And do you have a sense on average what an employee who might I guess potentially earn so far as a range under this, under the '08 bonus plan? In other words, what's the maximum award given any single individual under it? Do you know?

A. There was a dramatic range and I'm not aware of the maximum for '08.

Q. Who determines those awards for insiders?

MR. KESSLER: Objection; calls for legal conclusion, Your Honor.

THE COURT: Yeah we're going to get into what's an insider, what's not an insider.

BY MR. MCMAHON:

Q. The '09 plan any different in terms of its mechanics?

A. No, it was based on recommendations for key employees and to be fair, there were differences. The ’08 plan if I can explain the difference for a minute. The ’08 plan was one that was put in place when I arrived. We made the decision, the executive committee made the decision in March of ’08 when we paid out the ’08 bonuses which were down dramatically from the ’07 bonuses. We made the decision to use, unfortunately, any employee who had a bonus over $50,000.00, which was not a large number of employees, we made the decision to hold back a material amount of that amount, the amount over $50,000.00 and spread it out over four quarters. So where the ’08 money comes from was it was a former retention tool to hold the employees at the firm and that’s the money that we’re talking about here.

Q. You testified regarding your impressions of necessity and whether or not the payments are necessary in order to keep the business alive which is really what we’re here for today. Of the, I guess, what, how many employees have left the Debtors’ employ post petition that might be entitled to awards under this program, any of the three plans you have here?

A. A handful.

Q. I’m sorry?

A. A handful.

Q. What’s that less than - -

A. Between 5 and 10.
Q. And is the fact that they left a fact they're entitlement to be paid under one or more of the programs?
A. Absolutely. You have to be here to collect it.
Q. And to be clear, we're talking about, that's for the commissions, the '08 and '09 bonus plans and deferred awards, all three?
A. For any of those the firm policy is you have to be here to collect any of those.

MR. MCMAHON: Your Honor, I don't have any further questions for the witness.

THE COURT: All right, any other cross? Redirect? Any redirect?

MR. KESSLER: No, Your Honor.

THE COURT: Thank you. You may step down.

MR. LEVINE: Thank you.

MR. KESSLER: Your Honor, that concludes our testimony. I'd like to just briefly make a little more argument in connection with the bonus plan.

As you heard from, from Mr. Levine employees have to be here to collect. That is really the crux of the problem. They're here so long as they, there's still an opportunity to collect. The fear, the logical fear is that if the Court says you can't collect, there's no reason for them to remain with us and the fear gets extremely greater that they will

leave for another opportunity. It's, it's a necessity of keeping the employees, we believe, company believes, to pay them what they've been promised on the dates that they were promised to be paid. You heard from Mr. Levine that some of their bonus awards were deferred so that the employees could and would be encouraged to stay with the company. And to not pay them now is almost like telling them that they were induced to stay under some form of false pretense. And we can logically conclude from that, that we created more and more incentive for them to leave. The amount of money we're talking here is in relation to putting the Berkadia sale at risk, it just doesn't make sense to us. We, whether you believe that they would leave for sure or believe that there would be a risk of their leaving, I don't believe that that either of those conclusions affects the necessity of payment doctrine. We frequently approve payment for example to critical vendors because we believe they won't ship. We don't know for certain that they won't ship if we don't pay them. We say, we come into Court and we say they have threatened to stop shipping. They have told us they won't ship unless we pay their prepetition bills. If they don't ship, we won't have inventory for the Christmas season. But the standard is rarely that if we don't pay them, they will absolutely, they will absolutely refuse to do business. I think the same standards should apply here. We have to apply

a standard of what is reasonable under the circumstances. What are the risks that we should and should not take with respect to affecting the business on an ongoing basis. I believe that's what the Committee analyzed and that's why the Committee, who at first was not persuaded, came around to thinking along the same lines as the company and agreed that it was in the best interest of the estates that these people be paid. I can't guarantee you that someone is going to walk out the door. We're just dealing with risks here.

THE COURT: Understood.

MR. KESSLER: Thank you.

THE COURT: Ms. Caton, any comment? Nothing further?

MS. CATON: No, Your Honor.

THE COURT: Okay. Mr. McMahon.

MR. MCMAHON: It's the Debtors' burden to carry the record today, Your Honor, with the demonstration that they satisfy the doctrine of necessity. And necessity, Your Honor, I think if we're going to start injecting the word risk into our arguments there's obviously a risk that a meteorite could hit my house today. I hope it doesn't, but certainly it's the type of thing that this Court looks at in terms of evaluating the record. What is the real harm to the Debtors if the payments aren't made. Had the Debtors made a showing, a real evidentiary showing not in statements, not

trying to, you know, by statements from counsel that he heard from an attorney that are hearsay, not by, you know, trying to introduce a hearsay letter at the hearing, but in, not by, you know, the Debtors' CEO impression that, you know, things are tense around the company. What really does the record bear out here. Well, the only thing factual from the standpoint of necessity that's been born out is that really that five people have left since the petition date. I don't think that the record that has been made here, Your Honor, certainly rises to the level to give this court sufficient pause from the standpoint that the business is going to shut down tomorrow if these payments aren't made. We've, you know, we can go through the myriad analyses associated with the reasons why we believe that's the case, but at bottom it's more than just a Committee non-objection. We think there's a risk. I don't think the evidentiary record really has born that out. Third Circuit law requires something stricter than that to, to carry the day insofar as an evidentiary showing. And, you know, with respect to Your Honor's observation regarding the inner play of 503(c) and the doctrine of necessity, it's, it would be high irony, at least, to the extent that for insiders, and we'll get to this issue later, that the, you know, we needed to make the payments in order to retain them was effectively the argument. In other words, that would be I think a bit

counterintuitive with the principles of 503(c), but we'll carry that point on December 10th. For today's purposes, I don't know whether the showings been made.

THE COURT: All right, thank you. Well, you can sit down Mr. Kessler. I'm going to overrule the objection and approve the program. I find that the necessity of payment doctrine is satisfied to pay these prepetition claims for the purpose of retaining these employees, to get us to a closing of a sale that will provide funds to the Debtors' estate well in excess of the maximum potential liability here. I don't have to check my common sense at the door when I come in here. And it's simply, it's a reality of life that people who think they're owed a certain amount of money, who have been promised a certain amount of money, and don't get paid it get pretty ticked off and are ready to leave. I think a good example would be associates who took pay cuts. They're not happy. If they can go somewhere else, they will. I do think that the purpose here is clearly retentive. And I do think that 503(c)(3) really applies, well 503(c) applies to payment of administrative expense claims. And you are, in effect, turning a prepetition unsecured claim hearing into an administrative expense claim. So to 503(c)(3) I find is also satisfied in that these payments are justified by the facts and circumstances of the case. Now those are for non-insiders. I think this is a retention plan so if there are

proposed payments to insiders 503(c)(1) is not satisfied, we're going to leave that for another day. And I understand the Debtors' intent is to establish who is and who isn't an insider. And I don't believe I've heard, as a matter of fact I definitely heard that they didn't intend to pay insiders under this program. The commissions and the deferred payments are clearly set on a defined system where the employee knows ahead of time what the payout will be based on how he or she, how hard he or she works. The bonus plans similarly, although they are subject to discretion of management and usually are, are I think, the criteria established today are sufficiently clear to in effect say again they're not giveaways. And again none of them are going to insiders so I'm not very concerned about that at all. Overrule the objection. I'll prepare the motion and do you have a form of order?

MR. KESSLER: Thank you, Your Honor. May I approach?

THE COURT: Yes. All right, I'll have a look at it.

MR. KESSLER: I might add that the order you're reviewing, Your Honor, has been reviewed carefully and almost co-written with the Committee's counsel.

THE COURT: So who gets the bill for it? Okay I'll sign the order.

MR. KESSLER: Thank you, Your Honor. I have two hours and five minutes and only four things left so I think we're on schedule. If I can, I'd like to turn next to item number 13 on the agenda. And this is the motion to approve the sale and bidding procedures for the military housing, sale of the military housing business. This motion was filed on October 30th on full notice. On November 12th, a revised asset purchase agreement was filed reflecting the inclusion of all of the schedules to be added to that purchase agreement. And as of the objection deadline, no objections have been filed. As with all the other motions that Your Honor has heard today, we extended the deadline for the U.S. Trustee and the Committee. All the parties whose contracts are to be assumed and assigned under the transaction who received notice of the hearing and have received a copy of the revised asset purchase agreement listing their contracts as among the contracts that are being, to be assumed and assigned. This is, this contract relates to the business of Capmark Financing and Capmark Capital, Inc., two Debtors. And the business, among other things, arranges and provides financing for the United States Government public and private venture capital, excuse me, venture military housing relating projects including privatization of military housing and the origination and servicing of loans relating to military housing. It's a small nitch business for Capmark. A few

other parties are in the business and it's a relatively small market in the servicing industry. As a result, we believe there is a very small market of potential purchasers of this business. Given that there's very limited financing available for these types of projects in the current environment, the military housing business revenues for Capmark has declined significantly in 2008 and 2009. The business is not a part of the Debtors anticipated reorganization or the Debtors sale of the mortgage servicing business which the Court has now approved. Additionally, in light of these Chapter 11 cases, financing counterparties are likely unwilling to enter into new military housing transactions with Capmark. And so in light of the foregoing the financial burden of keeping this business going, a decision was made to market the sale of the military housing business. We believe it's in the best interest of the estate to do so. So in this regard before and after the commencement date, the Debtors worked diligently with the financial advisors to explore a sale of military housing. They found a purchaser and have entered into an asset purchase agreement with Jefferies Mortgage Finance Company, Inc. as a stocking horse bidder. The APA provides for the purchase of only the servicing business of the military housing portion of the Debtors' business but not the loan origination business that is associated with that part of the

business. And that is why we'll come to another motion right after this one. The purchase price is $9 million dollars. It's subject to certain closing adjustments that will not exceed $500,000.00. It provides for a breakup fee to Jefferies in the event of a loss of the sale to a higher bidder. The breakup fee is $250,000.00 which is just under 2.8% of the purchase price. I think well within the range of breakup fees typically approved in this district. Given the substantial time effort and the funds expended by Jefferies, we also think that the breakup fee is fair and appropriate in the event of a sale to a higher bidder. If no timely topping bid is received from another bidder, we would request and we believe that a prompt sale of the assets without an auction would be appropriate; however, if we do get a topping bid under the bidding procedures that we would ask the Court to approve today, of course, we would conduct an auction pursuant to those procedures. So the motion today is seeking two separate orders. First, the bidding procedures order with respect to the military housing business which would provide for the scheduling of an auction if there is another qualifying bid; approval of bidding procedures; approving the breakup fee to Jefferies; scheduling a sale hearing after we've identified the highest bid; establishing an objection deadline and approving the sale hearing form of notice that

and the notice of assumption and assignment of contracts that would go out to, as part of this process.

And the second thing we're asking is for a sale order approving the sale; however, today for obvious reasons. We're not asking for the entry of the sale order. That part of the motion would be deferred until the sale hearing.

Since the motion was filed, we can say there have been some indications of interest for the business. And following discussions with the Committee, we've agreed to modify the schedule forbidding and sale that's set up in the motion to ensure a little bit of extra time and additional time for third parties to properly review the diligence. We like to schedule the following dates if acceptable to the Court that we'd have a bidding deadline of December 7th at 10:00 a.m. It was previously November 30th in the motion; a deadline to determine qualified bids of December 8th, one day later. It was scheduled at December 2nd in the motion; a sale objection deadline of December 4th as opposed to the December 1 date that's in the motion; an auction if necessary on December 9; and the sale hearing at our next omnibus hearing dated December 10th at 2:00 p.m. Additionally, in the motion, Your Honor, as I mentioned earlier, we're asking for approval of the form of bidding procedures which are very similar to the bidding procedures that we adopted in the Berkadia or in the servicing business sale and consistent with generally

with bidding procedures used in many, many other 363 sales. We're asking for approval of the breakup fee as I noted earlier; the sale notice and form of notice of assumption and assignment. We made a couple of other changes to the bidding procedures that have been requested by third parties that relate to qualifications to bids, the form of non-disclosure agreement that must be signed, and so forth. We've not received any objections and I'd like to ask the Court to approve this motion, at least the portions of the motion that we requested approval today and the dates that we have asked, we've asked the Court for.

THE COURT: Does anyone wish to be heard? Yes, sir.

MR. BRODY: Good evening, Your Honor, Josh Brody, Kramer Levin on behalf of the Committee. Just to echo some of Mr. Kessler's comments. We had a number of discussions with the Debtors about the form of order. And subsequent to the objection, we had been contacted by a potential purchaser who had asked that we move the bidding date out a little more to give them additional time especially given the Thanksgiving holiday weekend coming up, and the Debtors were amendable to that. And with those changes to the order, we agree it be a good idea for the Debtors to have this order entered.

THE COURT: All right, thank you, anyone else? Okay I'll approve the motion. Can I see an order? You may approach.

MR. KESSLER: We have on the agenda that the United States Trustee's office wanted to make some informal comments on the record but he stepped outside and I see him in the hallway. Would you like me to get him?

THE COURT: Yeah if you don't mind.

MR. KESSLER: The U.S. Trustee's office asked that some additional language be placed in the order about the payment of the breakup fee, specifically that the breakup fee would only be payable out of proceeds of the sale and would not apply to a sale in a converted Chapter 7 if that were to occur, and we adopted that language.

THE COURT: Okay, thank you. I'll sign the order as modified.

MR. KESSLER: Thank you.

THE COURT: Moves us to agenda 14, I believe?

MR. KESSLER: Yes, Your Honor. Item 14 on the agenda is what I'll call a companion motion to the motion to sell military housing. As I mentioned in my discussion of the military housing sale, Jefferies is buying the servicing business but not the loan origination business. The Debtor in its military housing business had, has a loan origination or loan commitment, I should say, of $50 million dollars that is fully unfunded which is to say the Debtors have not loaned out any money with respect to that loan. If the military housing business were to be sold and this loan commitment

stay on the books of the Debtor, we would reject the contract, not fund any portion of it, and leave the borrower with a rejection damages claim. Instead, the Debtors have been able to find a purchaser who is willing, I shouldn't call them a purchaser, an inquirer who is willing to take the $50 million dollar loan commitment for no payment consideration. Because it has no value since no amounts have been funded and it's at market rates subject to the Court providing an order, I'll call it a comfort order, that gives them good title to the loan commitment. The benefit to the Debtor is that we don't have to reject the contract and expose ourselves to rejection damages of the borrower. And we will be freed upon the assignment of this contract of any further liability under that loan commitment. And so for that reason, we think that it's a reasonable business judgment on the part of the Debtor to assign or transfer this asset notwithstanding the zero consideration. We don't think it has any value in the market place, but it does have the benefit to us of avoiding the damages.

THE COURT: All right, does anyone wish to be heard?

MR. MAYER: Yes, Tom Mayer for the Creditors Committee. We support this transaction. Our practice, not involving this case at this time, involves a fair amount of the transfer of debts so it's not an uncommon transaction. I just wish to state a reservation the Committee does not

concede that there would, in fact, be damages from rejection of this contract. And I hope that does not become an issue in other matters in this case.

THE COURT: All right, understood.

MR. KESSLER: I concur. I've, if I didn't say it before I would correct to say we would risk a claim being made, whatever might happen with that claim is not being - -

THE COURT: Anyone else? All right, I'll approve the motion and sign the order. You're welcome. So I think at this point, I've signed the order, at this point we've got cash collateral and the Premier Asset Management motion, correct?

MR. KESSLER: And we have one other item and that's the order on ordinary course professionals which Mr. McMahon said he wanted more time to review. And I think that he's had some conversation with one of my colleagues about a slight adjustment to that. Since we're talking about it, I don't know if you want to do it now or?

THE COURT: Well is it, in effect, resolved, Mr. McMahon, subject to some language?

MR. MCMAHON: I believe it is, yes.

THE COURT: All right, why don't you just submit it under certification of counsel.

MR. KESSLER: If I may, I move to item 15 which is the sale of the Premier Asset Management Company. This is

another, and by the way this is docket numbers 175, 176, 177, and 186. This is another motion for a sale under Section 363, 365, etc., Your Honor. A little different from the other 363 motions we filed so far in this case. But it does ask for the following: the Debtor, I believe its CFI owns a Japanese subsidiary. The Japanese called Premier Asset Management Company owns a 100% of the equity in that subsidiary. The Japanese subsidiary does loan servicing in Japan. The motion before Your Honor is to sell the equity of that Japanese subsidiary. And we have a stocking horse bidder by the name of Sandringham Investments. Now the contract that was signed prepetition with Premier provides that if the Debtor enters Chapter 11, we would seek an order authorizing this sale as a private sale without additional bidding. And if this Court were to not permit the sale as a private sale then we would go through the typical bidding procedures using Premier as a stocking horse bidder. The Debtors marketed this, the equity of this company for approximately six months to the commencement date and received only two offers of interest due in part, we believe, to the very complicated process of transferring Premier's business under Japanese regulatory requirements and other practical business considerations. By the sale of Premier, we're going to, we believe, maximum the value received for this business and recapture CFI funds which are currently

deposited are on deposit as servicer advance reserve accounts in Japan. My understanding is that under certain regulatory schemes in Japan, the servicer has advanced deposits that are available in the way of cash collateral to cover servicing advances if they're not paid by the servicer. So under this transaction, the purchaser would purchase the equity of the company and replace the cash deposits that are currently advanced by Premier in Japan. There is approximately $47 million dollars of funds in these accounts. Twenty-eight million of the $47 million are funds that got to Premier to make the advance as an intercompany loan. And as a result when this $28 million dollars comes back, it can be repatriated to CFI to a repayment of the intercompany loan. The remainder of the, of the funds are, however, funds that would have to be dividend back to CFI once they come out of the cash collateral account. And our understanding is that that dividend would not be payable to CFI for some period of time. And as a result, our purchaser has agreed to increase the cash payment for the equity to cover that additional cash and then, as the owner, take the dividend when the dividend would be payable to it. This allows CFI to realize a full recovery of the cash that it has on deposit in Japan upon the completion of this sale. In evaluating the two prepetition proposals or offers, the Debtors included that the purchase of the sale to Sandringham was the best. The purchase price

under the sale agreement is approximately $23,200,511.00; that's a conversion from yen with a possible premium on top of that of another $2,207,140.00. As I mentioned to you earlier, the purchase would also free up all the cash that is coming back to the Debtors. We have had expression of interest from other parties. They have asked to do due diligence. They've asked to for an opportunity to make offers to purchase the company. One of the parties who is asking to do that is the party who's been looking around and kicking the [indiscernible] of this company for a long time and they're back at it looking again. So here we are today asking that the sale be approved on a private sale basis to Premier. But in the alternative and if the Premier sale is not approved, then under a bidding procedures that would ask for the following date, dates, excuse me: a bidding deadline of December 7th; a deadline to determine qualifying bids of December 10th; a sale objection deadline of December 15th; an auction if we have more than one qualifying bid of December 14th; and a sale hearing on December 18th if that's available on Your Honor's calendar. In addition, if we have a bidding process and not a sale to Sandringham, we would seek approval of a breakup fee, as well as approval of the sale notices that are attached to the motion, and the notice of assumption and assignment of contract. The breakup fee is 50 million yen which converted to U.S. dollars is approximately

$552,000.00. It's 2.38% of the purchase price without the premium; 2.18% of the purchase price if we earn the premium. Again, I believe, well within the range of reasonableness for breakup fees in this district. And especially in the existing situation where we have a sale of relatively small dollars that is enormously complex because of the transnational effect of it and the necessity for the parties to consider and look at all of the different legal or laws that would apply to the sale and getting the money repatriated back to the CFI in the United States. But if we pull off this deal and get it done successfully, it's a, it would be a terrific result for the Debtors' CFI. I believe the Committee wanted to be heard on this. We do not have any formal objections.

THE COURT: All right. Your basic objection was you wanted an auction I understand if - -

MR. BRODY: Yes, Your Honor, again Josh Brody for the Committee. From the Committee's perspective, I think it's fairly straightforward. The bidding procedures are actually built into the purchase agreement. Since the filing of the motion, there have been other parties. I know that we've been contacted by who are interested in bidding. And the Committee believes that from the estate's perspective, given this additional interest, and we're not talking about keeping up bidding procedures for months and months and

months. It's a fairly limited amount of time. In our view, it just made the most sense to use that fall back position in the agreement to go to a public auction.

THE COURT: Very good.

MR. BRODY: Thank you, Your Honor.

THE COURT: You're welcome. Anyone else?

MR. KESSLER: I want to correct one thing I made on the, an error I may have made on the record. The deposits are approximately $75 million dollars that will come back to the Debtor in the form of repayment of the intercompany debt and increase of the purchase price to cover the cash that would only be subject to repatriation by dividend.

THE COURT: Okay.

MR. KESSLER: The total cash to the estate would be in the range of $80 million dollars.

THE COURT: All right, excellent. Anyone else? All right, do you have an order?

MR. KESSLER: Yes, Your Honor. Which one, the private or bidding?

THE COURT: Bidding procedures, wasn't that the deal?

MR. BRODY: Well, Your Honor, again I think if the Debtors were filing a motion seeking first a private sale on the alternative of bidding procedures from our perspective

you got the bidding procedures was [indiscernible] to make the most sense.

THE COURT: Right and that was the basis of the resolution.

MR. KESSLER: No, we haven't resolved it - -

THE COURT: Oh you haven't resolved it?

MR. KESSLER: The reason - -

THE COURT: No I'll put in here, no, no.

MR. KESSLER: The reason, I'm here asking for private because - -

THE COURT: No, no, no, bidding procedures, bidding procedures. I have a little note here from this morning, auction if Committee wants one. It's written right here. You were DOA, Mr. Kessler. We'll do the 18th at 9:00 a.m. Oh you wrote in here 10:00 a.m.

MR. KESSLER: It's been a long day, Your Honor.

THE COURT: That's all right. I'll give you 10:00. I know I'm moving it. The case I'm moving is not generating $80 million dollars in cash. All right, I signed the order.

MR. KESSLER: Your Honor, I think we're at the last item on the lengthy agenda and its item number 11. It's the motion to approve the use of cash collateral scheduled for a final hearing today. But I'm here asking that it be, that the interim order be extended to December the 10th. We do have, I believe, an agreement with the secured lenders for a

final order dealing with the use of cash collateral subject to our continuing to tweak what is an extremely complex order. I think we could have had it done today, but the reason why we're asking to extend the interim order to December 10th is to give the Committee more time to review and comment on the order and, frankly, also for us to help through it and explain the reasoning behind some of the revision. So what we're asking for today in the extension of the interim order is to continue the order almost exactly as it was entered earlier except that we will have the consensual use of an additional $3.1 million dollars of cash per an Exhibit B that is attached to the interim order. And, in addition, any portion of the cash collateral that was approved in the first interim order that has not already been spent would roll over into the second interim order period. And I'm quite hopeful that when we come back on December 10th, we will have a consensual cash collateral order to hand up. No promises, but I'm hopeful.

THE COURT: Anyone wish to be heard?

MR. BRODY: Your Honor, just to echo Mr. Kessler's comments, we have been in discussions with the Debtors about the cash collateral order, and I think that Mr. Kessler adequately, accurately, rather, expressed the current draft of the final order that's in process is fairly complex. The Committee had really just seen it for the first time this

past Thursday night. And after discussions with the Debtors and the lenders, they had agreed to move that. And we are working it through and we hope to come up with a consensual resolution by December 10th, although I'm hoping that maybe Your Honor will use that formulation for the last order, though if the Committee wants it, we'll get it. But absent that I'm hopeful we can come to a professional resolution.

THE COURT: All right, so you're okay with this order? I just don't want to make - -

MR. BRODY: Yes, Your Honor, this order is fine.

THE COURT: All right, anyone else? Yes.

MR. SOSNICK: Good afternoon, Your Honor, I'm Fred Sosnick from Shearman and Sterling on behalf of Citibank. I think what the Debtor and the Committee both said is accurate. I think we are pretty close to getting done. I think just want to be clear that I think this is the last consensual deal we're going to have under the existing framework. This was a long and hard decision by the lenders to extend under the existing order albeit for only a little bit more money, and I think we really need to get a final resolution done and hope to do it by the 10th.

THE COURT: Okay. Mr. Kessler, approach with an order please.

MR. KESSLER: Yes, Your Honor. There's a black line [indiscernible].

THE COURT: Thank you. Okay I'm signing the order.

MR. KESSLER: Your Honor, if we could just have one or two minutes to be certain that we covered under the agenda. I think we did, but since we were bouncing around I just want someone to concur for me.

THE COURT: Take a short recess.

(Court in recess)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajaczkowski 11/30/09

Mary Zajaczkowski Date

Transcriber